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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1740~~ 70-198

In the Matter
of
The Settlement of the Final Account of Proceedings of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935 made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III.

LAURA ACHESON DOWELL, EDWARD GOODRICH ACHESON, IV, MARGARET ACHESON KENNEDY, THOMAS R. ACHESON and JOHN W. ACHESON,

Petitioners,

v.

HELEN F. ACHESON, STEPHEN A. HELMAN, as Guardian *ad Litem* of LINDA BELLE ACHESON, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Edward Goodrich Acheson, III, Deceased, and MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935 made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	9
I.	9
II.	12
III.	13
Conclusion	16

Cases Cited.

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522, 525-526 (1931)	14
Durfee v. Duke, 375 U. S. 106, 111-112 (1963)	14
Ford v. Ford, 371 U. S. 187, 194 (1962)	15
Hanson v. Denckla, 357 U. S. 235 (1958)	9, 10, 11, 12, 15
Matter of Harriman, 124 Misc. 320, affd. on opn. below, 217 App. Div. 733 (1st Dept. 1926)	10
Matter of Murchison, 349 U. S. 133, 136 (1955)	14
Reynolds v. Stockton, 140 U. S. 254, 264-265 (1890)	15

Constitutional and Statutory Provisions.

California Code of Civil Procedure:	
§ 473	2, 3, 7, 13, 14
§ 389	3, 12
§ 715.5	6, 10
Personal Property Law § 11; now Estates, Powers and Trusts Law § 9-1.1	5

PAGE

Title 28, Section 1738, of the United States Code, Vol. 6, p. 5051 3

United States Constitution 9
Article IV, Section 1 3
Amendment XIV, Section 1 3

28 U. S. C. § 1257(3) 2

RULE.

N. Y. CPLR, § 5601[b][1] 9

MISCELLANEOUS.

"Trust Assets of Insured Commercial Banks, 1969," published by the Board of Governors of the Federal Reserve System, p. 48 9

Appendix:

Majority Opinion of New York Court of Appeals, per Fuld, Ch. J. A1

Dissenting Opinion of Breitel, J. A10

Opinion of New York Supreme Court, New York County A27

Decision and Order of California Superior Court, Dated October 4, 1968 ..... A49

Final Order of New York Supreme Court Entered September 17, 1969 ..... A52

IN THE

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HELEN F. ACHESON, STEPHEN A. HELMAN, as Guardian *ad Litem* of LINDA BELLE ACHESON, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Edward Goodrich Acheson, III, Deceased, and MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935 made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Opinions Below

The opinions below have not yet been reported. The majority opinion of the Court of Appeals, Fuld, Ch. J. writing, with three judges concurring, is printed in the Appendix to this petition at A1-A10. The dissenting opinion, Breitel, J. writing, with two judges concurring, is printed in the Appendix at A10-A26. The opinion of the New York Supreme Court, New York County, is

printed in the Appendix at A27-A48. The decision and order of the California Superior Court dated October 4, 1968, denying petitioners' motion under § 473 of the California Code of Civil Procedure, is printed in the Appendix at A49-A51. The final order of the New York Supreme Court dated September 17, 1969, is printed in the Appendix at A52-A66.

Jurisdiction

The order of the New York Court of Appeals was entered on April 7, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Questions Presented

1. Whether a default decree of a California probate court, construing the attempted exercise by a California decedent of his power of appointment of a New York *inter vivos* trust in such manner as to evade the New York rule against perpetuities, is entitled to full faith and credit in an accounting proceeding previously brought by the trustee in New York, where the California court lacked jurisdiction *in personam* of the petitioners and of the trustee and *in rem* jurisdiction of the trust, and lacked subject matter jurisdiction of the construction proceeding.

2. Whether the petitioners are deprived of property without due process of law where their interests in a New York *inter vivos* trust are determined to have been cut off by the California construction decree, or because of their motion which was denied upon procedural grounds to vacate that decree and for leave to appear and be heard, and where no court has ever considered or passed upon the merits of their case.

Constitutional and Statutory Provisions Involved

Article IV, Section 1, of the United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 28, section 1738, of the United States Code, Vol. 6, p. 5051 (in part):

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Amendment XIV, Section 1, of the United States Constitution (in part):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

California Code of Civil Procedure, § 473 (in part):

> "[*Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect.*] The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months after such judgment, order or proceeding was taken."

California Code of Civil Procedure, § 389 (in part):

> "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties . . . ."

Statement

1. In 1935 Margaret Maher Acheson, as settlor, and Morgan Guaranty Trust Company of New York, as trustee, entered into a trust indenture in New York City. The indenture created a trust for the life of the settlor's son, Edward Goodrich Acheson, Jr., who died in 1962. Upon his death the trustee was directed to hold one-sixth of the corpus in further trust for the life of the settlor's grandson, Edward Goodrich Acheson, III ("Acheson"), who died in 1965 domiciled in California. Upon Acheson's death the trustee was directed to distribute this one-sixth part in such manner as Acheson might appoint by will, and if he should fail effectually so to dispose of the corpus, the trustee was directed to distribute the corpus as upon his intestacy.

2. The trust has at all times been administered by Morgan Guaranty Trust Company in the City of New York. The indenture contained provisions showing that its construction and administration were to be governed by the law of New York, and the Supreme Court of New York, New York County, therefore held (A35):

> "It is not disputed that the indenture is to be dealt with as a New York trust. . . . Accordingly, the determination as to the validity of the exercise of such power of appointment, and necessarily as to the disposition of the trust corpus, is a function to be exercised only by the New York courts."

Both the majority and minority opinions in the New York Court of Appeals agreed with this holding of the lower court (A8 and A15).

3. In his will, probated in California in December 1965, Acheson attempted to exercise his power of appointment of the New York trust. He directed that the corpus be held in further trust by his executor, the Bank of America, for the life of his daughter, Linda Belle, who was not born until

1949. The New York Supreme Court held that this attempted extension of the term of the New York trust for the life of a person not in being in 1935 violated the applicable New York rule against perpetuities (Personal Property Law § 11; now Estates, Powers and Trusts Law § 9-1.1).

4. In August 1966 Morgan Guaranty Trust Company commenced a proceeding in the New York Supreme Court for settlement of its account as trustee of the 1935 trust. Its petition stated that a question had arisen as to the validity of the exercise of the power, and asked for an order construing such exercise and instructing the trustee as to how the trust fund should be distributed. All interested parties were properly notified and appeared, including those who would benefit by a holding that the power was lawfully exercised (Acheson's widow and their daughter, Linda Belle, the latter by a guardian *ad litem* appointed by the New York Supreme Court), and those who would benefit by a holding that the power was not lawfully exercised (Acheson's five children by earlier marriages, the petitioners here).

5. In March 1967 Linda Belle's guardian *ad litem* in a letter to the New York Supreme Court requested an indefinite delay of the court's decision in the accounting proceeding until the institution and termination of a proceeding proposed to be brought in California by Acheson's executor to construe his exercise of the power of appointment. To the delay requested these petitioners strongly objected in a letter to the court, saying (R. p. 250; part of Ex. 20, Vol. II):

> "Because the trustee and the corpus of the trust are situated in New York, and all parties interested therein are before the court, there is no reason for the indefinite delay in the decision of this court which [the

> guardian *ad litem*] has requested. Conversely, since [the petitioners] are not parties to the California probate proceeding, there is no conceivable way that anything that might be done there would be binding upon them or could control or influence your Honor in the determination of their interests."

6. In May 1967 Acheson's executor, the Bank of America, petitioned the California Superior Court sitting in probate for an order construing the exercise of the power of appointment so as to change the period, for which the assets received from the New York trust should be held in further trust, from the life of the daughter, who was not in being in 1935, to the life of her mother, who was in being in 1935. The petition was designed to invoke the broad *cy pres* power conferred on a California court by § 715.5 of the California Civil Code, which has no counterpart in New York, and which reads:

> "No interest in real or personal property is either void or voidable as in violation of [the rule against perpetuities] if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

7. The executor's petition to the California court failed to state that a proceeding for the construction of the exercise of the power of appointment was already pending in the New York Supreme Court and was then ripe for determination. The petitioners, none of whom resided in California, were notified by mail that a proceeding "for instructions and determination of heirship" had been instituted in the California court, but Morgan Guaranty Trust Company was not made a party to the proceeding.

8. For the reasons previously stated in their letter to the New York Supreme Court, the petitioners did not appear in the California construction proceeding. On September 18, 1967 the California probate court granted a decree, substantially as requested by the executor, to the effect that Acheson's attempted exercise of the power should "be construed as requiring that any trust still existing under [Acheson's] Will twenty-one years after the death of Helen F. Acheson then terminates as to all assets in such trust derived from the Margaret Maher Acheson Trust . . ." (R. p. 114).

9. After entry of the construction decree of September 18, 1967, facts came to the attention of petitioners' counsel which indicated that Acheson had died intestate with respect to his own property as well as with respect to the New York trust fund, and that if the petitioners had received notice of the probate proceeding and had filed objections, the will would probably have been denied probate. To protect their rights petitioners then retained California counsel, and a motion was made under § 473 of the California Code of Civil Procedure, quoted *supra* at p. 3, to vacate the construction decree and for an order permitting the petitioners to appear and to be heard on the merits. The "Statement Setting Forth Interests" proposed to be filed by them was broad enough to permit proof of all the facts showing that Acheson's will itself was not entitled to probate.

10. Petitioners' motion was opposed on the ground that their failure to appear in the construction proceeding on the return date of the executor's petition was intentional and not the result of "mistake, inadvertence, surprise or excusable neglect" as required by § 473. Petitioners' motion was denied upon this ground, and the California probate court concluded (A51):

"By reason of the foregoing views, it is not necessary to rule (nor do we) on the question as to whether there appears to be any merit under California Law to the substantive position taken by the moving parties. . . ."

11. Despite the denial of petitioners' motion upon purely procedural grounds, and the refusal of the California court to grant them a hearing on the merits, counsel for Bank of America and for Acheson's widow and minor child then offered the California construction decree of September 18, 1967 as entitled to full faith and credit in New York and as determinative of the parties' interests in the New York trust. This view was adopted by the New York Supreme Court, which directed distribution of the New York trust to the California executor for disposition as specified in the construction decree.

12. The petitioners have consistently maintained that the California probate court had no jurisdiction to determine their interests in the New York trust, and that accordingly the California decree was not entitled to full faith and credit in New York, and that to accord that decree full faith and credit and to cut off their interests in the New York trust without a hearing in any court upon the merits of their case would deprive them of property without due process of law. The petitioners' position was stated fully in the affidavit, requested by the New York Supreme Court, of Gerald E. Porter, Esq., of Messrs. Adams, Duque & Hazeltine of Los Angeles (R. pp. 159-180), and in the memoranda of law and briefs filed by the petitioners in the New York Supreme Court, in the Appellate Division and in the Court of Appeals.

13. On March 23, 1970 the petitioners filed a notice of appeal as of right to the Court of Appeals "upon the grounds that there is directly involved the construction of

Article IV, Section 1, and Amendment XIV, Section 1, of the Constitution of the United States . . . ." (R. p. 267). On May 14, 1970 the Court of Appeals, denying the petitioners' alternative motion for permission to appeal, held that an appeal properly lay as of right (27 NY 2d 534; see N. Y. CPLR, § 5601[b][1]).

Reasons for Granting the Writ

I

The decision of the New York Court of Appeals in this case is in direct conflict with the decision of this court in *Hanson v. Denckla*, 357 U. S. 235 (1958), and other decisions holding that the courts of the state of the situs of an express trust have exclusive jurisdiction under the Federal Constitution to determine whether a testamentary power of appointment conferred by the trust has been effectively exercised. The rule laid down in the *Hanson* case is of great practical importance in the administration of the many billions of dollars of express trusts held at the financial centers of the nation.[1]

In *Hanson v. Denckla* this court said:

> "Founded on physical power, *McDonald v. Mabee*, 243 U. S. 90, 91, the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State" (357 U. S. at 246).

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[1] "Trust Assets of Insured Commercial Banks, 1969," published by the Board of Governors of the Federal Reserve System, p. 48, states that the capital funds held by such banks in testamentary and *inter vivos* trusts and in employees' pension trusts in New York totaled more than $70 billion. No estimate is given of what portion of these funds confer a testamentary power of appointment upon a beneficiary.

> "The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will" (357 U. S. at 247-248).

The precise question presented in this case is whether a party can circumvent the rule of the *Hanson* case, and achieve the benefit of the more favorable law of another state, by obtaining in the state of the alleged domicile of the donee of the power a construction of the provisions of his will exercising the power.[2] The majority opinion below holds that *Hanson* can be so circumvented, and that the construction of the exercise of the power by the state of the donee's domicile—even though that state has no jurisdiction over the trust or the trustee or the beneficiaries—is entitled to full faith and credit in the state of the trust's situs. The minority opinion holds that *Hanson* cannot be so circumvented.[3]

We submit that the dissenting judges below are correct. The rule in the *Hanson* case is sound in principle and in its practical application (see BREITEL, J. at A25-A26). By

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[2] The majority (A3) and minority (A13-A16) opinions in the Court of Appeals agree that without resort to the *cy pres* powers conferred by § 715.5 of the California Civil Code (p. 6, *supra*), Acheson's attempted exercise of his power of appointment violated the New York rule against perpetuities.

[3] Although the majority opinion cites (A8) with apparent approval *Matter of Harriman*, 124 Misc. 320, affd. on opn. below, 217 App. Div. 733 (1st Dept. 1926), the landmark case in this branch of the law, Surrogate Foley there pointed out that, in order to prevent the very sort of maneuver that the majority of the Court of Appeals has permitted here, the court vested with the exclusive jurisdiction to determine the validity of the exercise of the power must also have exclusive jurisdiction to construe the provisions of the will exercising the power.

limiting the *in rem* jurisdiction of the several states over express trusts to those that are administered and have their situs within their respective boundaries, *Hanson* provides certainty both as to the law and the forum. To substitute the law and the courts of the domicile of the donee of the power, is to introduce uncertainty, to complicate the administration and accounting for trusts, and to subject the trust and the parties to the delays, expense and trouble of journeying to other jurisdictions to litigate issues that ought to be litigated at the situs of the trust.[4] "Domicile" is a vague legal concept that has given rise to much litigation. In this very case, although Morgan Guaranty alleged in its petition that Acheson was domiciled in California, the record shows that he actually died near the home he owned at Avon Lake, Ohio, which may very well have been his domicile at death (R. pp. 118, 121).

This court should therefore reaffirm its decision in *Hanson v. Denckla* by holding that the principle of that case cannot be circumvented and in effect nullified by obtaining a construction of the exercise of the power in the state of the donee's domicile entitled to full faith and credit where the trust is situate.

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[4] The record is perfectly clear that the construction decree of the California court was limited by its terms, as was the executor's petition, to a construction of the provisions in Acheson's will purporting to exercise the power of appointment. Bank of America's counsel, therefore, stated in their brief in the Court of Appeals (p. 19):

> "The heirship proceeding in this case was concerned exclusively with the exercise of the power of appointment under the *inter vivos* trust fund (R. pp. 100-108). Such a proceeding is, under California law, an *in rem* proceeding."

II

The California construction decree was not entitled to full faith and credit in New York for the additional reason that Morgan Guaranty Trust Company was not made a party and did not appear in the California proceeding. In the *Hanson* case, although there was no Florida statute to that effect, this court read the Florida decisions as holding that the Delaware trustee was an indispensable party to an effective judgment determining how the trust assets should be distributed.

In this case there is such a statute. Section 389 of the California Code of Civil Procedure provides:

> "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties . . . ."

Here, as BREITEL, J. points out in his dissent (A23-A24), the trustee was not a mere passive trustee, subject to the complete or substantial control of the creator of the trust. Nor were its powers and duties merely minimal or clerical in character so as to make it a mere "stakeholder". Its powers and duties were substantially those commonly vested by law and by trust instrument in the trustee of an *inter vivos* trust created for the benefit of the creator's descendants.

That Morgan Guaranty Trust Company was an indispensable party to the rendition of an "effective judgment between the parties" is also evident from the final order of the New York Supreme Court, which directed Morgan Guaranty to deliver the trust assets to Bank of America as executor, to be applied by the executor and held in further trust as directed in the New York Supreme Court's order (A65-A66).

III

The majority opinion below contends that even if California lacked jurisdiction of the New York trust and of the issue of whether there had been an effective exercise of the power, the construction decree was binding *in personam* upon the petitioners because (i) they had a duty to journey to California or to hire counsel there to oppose the construction sought by the executor in the heirship proceeding, and (ii) when they later filed their motion in California to vacate the decree, it retroactively became *res judicata* and entitled to full faith and credit in New York, as if the petitioners had originally appeared and had then had a hearing on the merits. The majority opinion holds that by making the motion to vacate the decree, even though it was denied solely on procedural grounds and without a hearing on the merits,

> "the appellants submitted themselves 'to the jurisdiction of [the California] court for the purpose of obtaining an adjudication as to the validity of the *** judgment *** This determination appears to be upon the merits and is *res judicata* and dispositive of this appeal.'" (A6)[5]

Acheson died leaving a substantial estate of his own. After entry of the construction decree facts came to the attention of petitioners' counsel indicating that Acheson's will should not have been admitted to probate. To protect petitioners' interests their California counsel made the motion under § 473 of the California Code of Civil Procedure. The motion was denied for failure to meet the condition precedent prescribed by § 473, *viz.*, the showing of

[5] None of the cases cited in the majority opinion for this proposition holds that where, as here, the petitioners have never had a hearing in any court on the merits, there is a determination of the controversy that is binding upon the parties and upon the courts of another state under the full faith and credit clause.

mistake or inadvertence in not appearing on the original return date of the executor's petition. The decision of the California court denying the motion accordingly concluded (A51):

> ". . . it is not necessary to rule (nor do we) on the question as to whether there appears to be any merit under California Law to the substantive position taken by the moving parties . . ."

The argument of the majority of the Court of Appeals that the petitioners nevertheless by their § 473 motion *constructively* had a hearing on the merits is constitutionally unsupportable. As this court pointed out in *Matter of Murchison*, 349 U. S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process."

In *Durfee v. Duke*, 375 U. S. 106, 111-112 (1963), this court quoted from *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 525-526 (1931):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

It is a far different thing to say that a court lacking jurisdiction of a *res* can retroactively cut off the interests of non-residents in that *res* without a hearing on the merits and without even considering "whether there appears to be any merit" to their substantive position. The California construction decree did not have that effect in California,

and it cannot constitutionally be given that effect in New York. *Cf. Ford v. Ford,* 371 U. S. 187, 194 (1962).

Even if, however, on some theory of constructive appearance or constructive hearing the California court retroactively acquired jurisdiction *in personam* over the petitioners, *Hanson v. Denckla*—where the Florida court had jurisdiction *in personam* over all the beneficiaries—clearly holds that jurisdiction over the subject matter being absent, the California decree was not entitled to full faith and credit in New York (see BREITEL, J. at A17). To the same effect is *Reynolds v. Stockton,* 140 U. S. 254, 264-265 (1890), where this court said with respect to the full faith and credit clause:

> "The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State. . . . the constitutional provision . . . does not forbid inquiry in the courts of the State to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person, or in respect to the subject matter, or, if rendered in a proceeding *in rem,* its jurisdiction of the *res.*"

Conclusion

The decision in this case decides an important federal question in a way that is contrary to the decisions of this court. This petition should, therefore, be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

Majority Opinion of New York Court of Appeals, per Fuld, Ch. J.

STATE OF NEW YORK
COURT OF APPEALS

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1. No. 394. 70

In the Matter
of
The Settlement of the Final Account of Proceedings of
Morgan Guaranty Trust Company of
New York, as Trustee &c.,
Petitioner-Respondent,

Helen F. Acheson, & ors., &c.,
Respondents,

Laura Acheson Dowell, & qrs.,
Appellants.

FULD, CH. J.:

This appeal calls upon us to determine whether the order of a California court, which construed the will of a California domiciliary—who exercised a general power of appointment created by a New York trust indenture—is entitled to full faith and credit in this State.

In 1935, Maragaret Maher Acheson, as settlor, and Morgan Guaranty Trust Company of New York, as trustee, entered into a trust indenture. Insofar as relevant, it created a trust for the life of the settlor's son, Edward Goodrich Acheson, Jr., and provided that, upon his death, the trustee was to divide the trust corpus into six equal parts, one of which was to be held in trust for the life of a grandson, Edward Goodrich Acheson, III (hereafter

referred to as Acheson). Upon the latter's death, the indenture further recited, the trustee was to distribute the corpus of that trust as Acheson might appoint by will or, failing the exercise of such appointment, to his distributees as in intestacy.

The settlor's son, Edward, Jr., the first life beneficiary under the terms of the trust, died in 1962. Acheson, domiciled in California, died in 1965, survived by his widow, Helen, and their daughter, Linda Belle, and five children by previous marriages. By his will, admitted to probate in California, Acheson exercised his power of appointment by specifically directing his trustee to divide his residuary estate into two trusts, one for the benefit of his widow and the other for the benefit of their daughter, Linda Belle. More particularly, the will provided that the trust for the latter was to "cease and terminate twenty-one (21) years after the death of the last survivor of my wife, HELEN * * * my daughter, LINDA BELLE * * * and the children of my said daughter, living at the time of my death."

The proceeding before us was commenced in 1966 by Morgan Guaranty in the Supreme Court, pursuant to CPLR article 77, to settle its final account under the separate trust for the benefit of Acheson. However, before that proceeding was concluded, Acheson's executor, Bank of America National Trust and Savings Association, instituted an heirship proceeding in the California Superior Court seeking an order construing the will in such manner as to require "termination of the Trust [for Linda Belle] * * * within twenty-one years after the death of HELEN F. ACHESON, the surviving spouse, if not sooner terminated by the death of LINDA BELLE ACHESON."[1] The New

[1] If the will were so construed, we pause to interpolate, it would eliminate and overcome any objection based upon the New York rule against perpetuities [EPTL] 9-1.1).

York court thereupon decided to hold the present case in abeyance pending the conclusion of the California construction proceeding.

In September of 1967, the California court granted the relief requested by Acheson's executor. Declaring that "the obvious intent of the testator * * * [was] that the residuary trust be curtailed, if necessary, to preserve the testamentary plan to the fullest extent possible from invalidity under the rule against perpetuities," the court construed the provisions of Acheson's will to require that "any trust still subsisting * * * twenty-one years after the death of HELEN F. ACHESON then terminates as to all assets in such trust derived from the MARGARET MAHER ACHESON Trust."[2] In so construing the will, the court applied section 715.5 of the California Civil Code.[3]

The appellants in the case before us, Acheson's five children by earlier marriages, who would share in the trust corpus only if the exercise of the power were held invalid, did not appear in the California heirship proceed-

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[2] The court gleaned Acheson's intent, in part, from the provisions of the will which recited that "I make no provision further for these my [five] children who have already shared in my inheritance * * * In the event that both my wife, HELEN * * * and my daughter, LINDA BELLE * * * shall predecease me and my daughter should have no descendants living at the time of my demise, then, and in that event, I give, devise and bequeath all the rest, residue and remainder of my estate in equal shares to my five children * * * I have intentionally omitted making provisions for all of my heirs who are not specifically mentioned herein."

[3] Section 715.5 reads in this way: "No interest in real or personal property is either void or voidable as in violation of [the rule against perpetuities] if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

ing, although properly notified of the executor's application. However, in March, 1968, some six months later, they applied to the California court, as authorized by statute (California Code of Civil Procedure, § 473), for relief from its determination, contending that their absence resulted from "mistake, inadvertence, surprise or excusable neglect."[4] It was their position that the court had, in construing Acheson's will, misread his intention and that, consequently, section 715.5 should not have been applied to save the power of appointment. After a hearing, the court denied the application on the ground that the appellants' failure to contest resulted not from "mistake, inadvertence, surprise or excusable neglect" but, rather, from a "calculated strategic omission" on their part. We note, however, that the New York trustee did not appear in the California proceedings.

Thereafter, in October of 1968, the respondents in the present accounting proceedings—Acheson's widow and Linda Belle—requested that full faith and credit be accorded to the California order. The court at Special Term agreed, holding that "the [California] instruction order, to the extent that it interprets the will by finding an intention on the part of the testator * * * to limit the duration of the trusts so that it be deemed not in violation of the rule against perpetuities, is entitled to full faith and credit" and was binding in personam upon the five appellants who had voluntarily appeared in the California proceeding. The court, therefore, directed payment of the trust corpus to the California executor according to

[4] Section 473 of the California Code of Civil Procedure provides, in part, that "the Court may, upon such terms as may be just, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

the terms of Acheson's will, and the Appellate Division unanimously affirmed the resulting order (34 A D 2d 619).

If anything is settled, it is that the courts of New York will look to the law of the testator's domicile for the meaning and interpretation of language used by him in disposing of his personal property by will. (EPTL 3-5.1, subd. [b], par. [2], 3-5.1 subd. [c]; see, *e.g., Matter of Fox,* 9 N Y 2d 400, 404; *Matter of Fabbri,* 2 N Y 2d 236, 239; *Matter of Gifford,* 279 N. Y. 470, 474-475; *Fell v. McCready,* 236 App. Div. 390, 394, affd. 263 N. Y. 602; see, also, Restatement, Second, Conflict of Laws, Proposed Official Draft [1969], §§ 263-264, pp. 154-160.) Since Acheson was domiciled in California at the time of his death, and there executed his will, there can be no doubt that it "must be interpreted in accordance with the rules and principles adopted by the courts of that State." (*Fell v. McCready,* 236 App. Div. 390, 394, affd. 263 N. Y. 602, *supra.*) The California Superior Court—a court of unlimited general jurisdiction with full authority to pass on the interpretation and construction of wills executed by California domiciliaries (California Probate Code, §§ 301, 302, 1080)[5]—in construing Acheson's will in the light of California law, explicitly held that his trust for the benefit of his daughter, Linda Belle, was to terminate not later than 21 years after the death of his wife, Helen. Quite obviously, under such a construction, Acheson's executor could receive and dispose of the trust principal set aside for Linda Belle in a manner not inconsistent with, or violative of, the New York rule against perpetuities (EPTL 9-1.1).

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[5] Since the court construed Acheson's will and *did not purport to consider the validity or construction of any inter vivos trust,* created either in California or New York, the suggestion made in the dissenting opinion that the California court lacked jurisdiction over *inter vivos* trusts (p. A40) is irrelevant in the present case.

There can be no doubt—and our dissenting brethren recognize this—that the California court, in rendering its decree construing the will, had personal jurisdiction over all five of the appellants before us; their postjudgment application, under section 473, to vacate the instruction order constituted a general appearance and that served to give the California court in personam jurisdiction over them. (See, *e. g., Farmers & Merchants Nat. Bank v. Superior Ct.*, 25 Cal. 2d 842, 846-847; *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*, 126 Cal. 418, 421-423.) In point of fact, whether or not the appellants actually received due notice of the California heirship proceeding is of no moment, since their later general appearance had "the effect of curing any defect arising from the lack of jurisdiction due to the failure to serve or notify a person of the proceedings." (*Farmers Nat. Bk. v. Superior Court*, 25 Cal. 2d 842, 846, *supra.*) As already indicated, the appellants postjudgment application was a request for *affirmative* relief—namely, that the power of appointment exercised by Acheson be declared invalid on the ground that the court had mistaken "his intent"—and at no time was any challenge made to the jurisdiction of the California court.

Under these circumstances, the appellants submitted themselves "to the jurisdiction of [the California] court for the purpose of obtaining an adjudication as to the validity of the * * * judgment * * * This determination appears to be upon the merits and is *res judicata* and dispositive of this appeal." (*Schwamm v. Davis*, 18 A D 2d 1070, mot. for lv. to app. den. 13 N Y 2d 597; see, also, *Sherrer v. Sherrer*, 334 U. S. 343, 350; *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 439-440; *Vander v. Casperson*, 12 N Y 2d 56, 59; *Parker v. Hoefer*, 2 N Y 2d 612, 616.) In giving full faith and credit to the California in-

struction order construing Acheson's will, we reaffirm the principle that parties "may not a second time challenge the validity of [their adversaries'] right which has ripened into a judgment." (*Parker v. Hoefer*, 2 N Y 2d 612, 616, *supra.*) Full faith and credit requires "a plaintiff to try his whole cause of action and his whole case at one time." (*Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 444, *supra.*) The appellants had an opportunity, in the California heirship proceeding, to challenge the court's construction of Acheson's will. Instead, as the California court put it, they made a "calculated strategic" decision not to appear in the proceeding. Having gambled on what the California tribunal would decide, they should not now be afforded a second opportunity to litigate the matter.

We hasten to add that it is irrelevant in the case before us to consider whether the California court properly construed Acheson's will under its own law. The appellants voluntarily submitted to that state's jurisdiction to contest a probate determination involving a California domiciliary. It necessarily follows that the courts in this State are precluded from "any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." (*Milliken v. Meyer*, 311 U. S. 457, 462; see, also, *Connolly v. Bell*, 309 N. Y. 581, 593; Restatement, Second, Conflict of Laws, Proposed Official Draft [1967], § 106, p. 394; 2 Beale, Conflict of Laws [1935], § 431.1, p. 1372.)

Certainly, there is no basis for maintaining that the instruction order of the California court is "jurisdictionally infirm" on the ground that it purports to determine the *validity* of an exercise of a power of appointment over a trust corpus located in New York. The court did not con-

cern itself with that matter.[6] It is quite true, as Special Term recognized, that the validity of the power's exercise is a question to be determined solely by the courts of this State. (See, *e. g., Hutchinson v. Ross,* 262 N. Y. 381, 394-395; *Matter of New York Life Ins. & Trust Co.,* 157 App. Div. 916, affd. 209 N. Y. 585; *Matter of Harriman,* 124 Misc. 320, 325, affd. 217 App. Div. 733). But that in no way implies that we may ignore a probate determination made in another state, in which its court expressly finds, on the facts before it, that the California decedent intended, by his will, that the trust therein created for Linda Belle was to terminate within 21 years after the death of his wife, Helen, who had been alive at the time of the creation of the Margaret Maher Acheson trust. Assuredly, if the New York court had so read and construed Acheson's will, there could and would be no complaint based on the rule against perpetuities.

This brings us to the appellants' final point. Morgan Guaranty, the New York trustee, did not appear in the California heirship proceeding. Urging that the trustee was an indispensable party in that case, the appellants contend that the California court lacked subject matter jurisdiction to determine rights in the trust. It is enough, for present purposes, to state that the trustee was not a necessary party in the California litigation in view of the fact that the California court passed neither upon the validity of the trust indenture nor upon the validity of Acheson's exercise of his power of appointment. No relief of any kind was demanded from the trustee, and, obviously, the latter's absence did not, to quote from the California

[6] Nor is this a case in which the issue posed is whether the testator, as donee of a testamentary power, intended to exercise the power in his will, in which event, the issue would be for the New York court. (See, *e.g., Matter of Deane,* 4 N Y 2d 326; *Matter of Spitzmuller,* 279 App. Div. 233, affd. 304 N. Y. 608.) Concededly, no one disputes or questions the fact that Acheson actually exercised his power.

statute, "prevent the court from rendering any effective judgment between the parties" (California Code of Civil Procedure, § 389). Actually, the California court did not even direct the New York trustee to distribute any of the trust assets to Acheson's executor, recognizing that any distribution of the corpus was to be made in a separate New York proceeding. As Special Term observed below, "the ultimate determination as to distribution of the [New York] trust corpus by the trustee is to be made in the proceeding pending before this court."

The appellants' reliance on *Hanson v. Denckla* (357 U. S. 235) is misplaced. The issue in that case involved the validity of the trust indenture itself, and no determination was possible until and unless the court acquired jurisdiction over the nonresident trustee. There was no such issue in the California case. It is significant that Morgan Guaranty at no time voiced any objection to the jurisdiction of the California court; it regarded itself, and very properly, as, in effect, a disinterested stakeholder, awaiting instructions concerning distribution of the trust corpus. In other words, whether the California instruction order is entitled to full faith and credit as against the trustee is of no consequence. Its only concern, as we have said, had to do with the distribution of the corpus, and that issue was, and could only be, decided by the New York courts.

In short, the disposition made by the courts below was eminently correct. The case presents a special and unique factual situation, and we may, with profit, sum it up by saying, as did Special Term, that "[t]he instruction order, to the extent that it interprets the will by finding an intention on the part of the testator Edward Goodrich Acheson, III, to limit the duration of the trusts so that it be deemed not in violation of the rule against perpetuities, is entitled

to full faith and credit as concerns all [appellants] in the proceeding pending before this court. The California instruction order is not [however] entitled to full faith and credit in the proceeding pending before this court as against the trustee * * * for [it] was not a party and it did not appear in such proceeding. The instruction order does not purport to direct the trustee to turn over to the California executor the trust corpus, but rather directs the California executor to receive the trust corpus, if, as and when, such turnover is directed in the proceeding before this court. But this is of no moment here, as the trustee has very properly assumed the role of a disinterested 'stakeholder', awaiting instructions by the final order to be entered in the proceeding pending in this court."

The order appealed from should be affirmed, with costs payable out of the trust to all parties appearing and filing separate briefs.

Dissenting Opinion of Breitel, J.

BREITEL, J. (dissenting):

True, a court of another state or nation, competent under its own law to decide a dispute, with all necessary parties before it, and with jurisdiction over the subject matter, may render a judgment to which, as the case may be, the courts of this state will be bound by the Full Faith and Credit Clause to enforce, or may by comity accord recognition. But that is not this case. The California court was not competent. Although the California Superior Court is one of unlimited general jurisdiction in most matters, it is not when it functions as a probate court. In that respect its limitations are the same as those applicable to the Surrogate's Court in this State. Moreover, an indispensable party, the trustee, was lacking. Nor was the

trustee "passive", a mere stakeholder, or empowered only to perform a "mere ministerial act" on behalf of the settlor, the circumstance in which the presence of the trustee may be dispensed with either under California or New York law. At least this would be so until, and only if, the California court directed the turnover thus terminating the trustee's function, a bootstrap *nunc pro tunc* achievement of jurisdiction if ever there would be. No case has so held, and the California cases relied on by respondents prove the contrary. And, of course, subject-matter jurisdiction in the sense of jurisdiction over the *res* was lacking.

Most important, the California court was not interpreting a will of one of its domiciliaries when it applied its peculiar *cy pres* statute to the exercise of a power of appointment, but instead was interpreting the exercise of the power of appointment created by and limited by the trust instrument over which it had no jurisdiction. Similarly, in applying conflict rules, those applicable to powers and not to wills govern, a rather elementary proposition.

These are the matters upon which the issues turn and it is upon the answers to those issues posed by the majority that the affirmance depends. If those answers are incorrect, and it is suggested that they are, the affirmance is unsupportable. To unravel the intermingled lines of reasoning it is best, if not essential, to retrace the logical steps and delineate the confusions where they arise.

In following the unraveling, however, it will be helpful to keep in mind that the majority opinion by its reasoning is able to conclude that a competent California court with jurisdiction over probate matters interpreted a will and thereby bound all the parties present before it, including appellants in this case. Hence, it applies full faith

and credit to the California order. The dissenting view is that the California court was not competent, the California court was not interpreting a will but the exercise of a power (which happened to have been exercised in a will) over which, for a variety of reasons, it had no subject-matter jurisdiction, and that, therefore, no principle of collateral or direct estoppel applies, even if the court had been competent. Hence, it denies comity, let alone full faith and credit, to the California order.

In 1935 Margaret Acheson established a trust in New York designating the Guaranty Trust Company, as it was then known, as trustee. The indenture provided that the corpus was to be held for the life of her son, Edward Goodrich Acheson, Jr., and upon his death, 1/6 of the corpus to be held for the life of her grandson, Edward Goodrich Acheson, III (Acheson). Upon the grandson's death, this part would pass as Acheson might appoint by will, or upon default to his distributees on intestacy.

Acheson died in 1965, domiciled in California. He was survived by his widow, Helen Acheson, their child, Linda Belle Acheson, respondents in the present proceeding, and by the appellants, five children by prior marriages. He purported to exercise the power in a will admitted to probate in California on December 27, 1965. The will, invalidly, as conceded by all and uniformly so held in the New York and California proceedings, provided that the corpus should be held in further separate trusts for the benefit of his widow and their daughter, Linda Belle Acheson, a beneficiary not in being at the creation of the 1935 trust, for their respective lives. The extension of the New York trust for the life of Linda Belle Acheson violated the New York rule against perpetuities (EPTL 9-1.1).

In August, 1966 this proceeding was begun by Morgan Guaranty, as it was now known, as trustee of the New York Trust for a final accounting, a direction as to the disposition of the corpus, and a construction of the California will to determine whether there had been a lawful exercise of the power of appointment. Before these issues were resolved by the New York court, the Bank of America, executor and trustee under Acheson's will, petitioned the California Superior Court for an order interpreting the will, but really the exercise of the power, to reconstruct and validate the exercise of the power despite its invalidity. The appellants, the five children of Acheson by his earlier marriages, who would take if the exercise of the power were declared invalid, did not appear in the California proceeding, although they apparently received extraterritorial notice. The California court, on default, granted the requested relief. In doing so, it applied section 715.5 of the California Civil Code, a statute without parallel in this or most states, enacted in 1963, which reads:

> "No interest in real or personal property is either void or voidable as in violation of [the rule against perpetuities] if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

On March 15, 1968 appellants applied under section 473 of the California Code of Civil Procedure for an order relieving them from the determination in the heirship proceeding. After a hearing, the California court denied the

motion. It refused to reach the merits on the ground that the appellants had known, apparently by extraterritorial notice, of the institution of the proceeding and their failure to contest it precluded them.

Respondents in the New York proceeding, Acheson's wife and daughter, then sought recognition by the New York court of the California order. Appellants objected that Acheson's exercise of the power was invalid and that the corpus should be distributed to both groups of beneficiaries, appellants and respondents, as distributees on intestacy under the alternative beneficiary clause in the 1935 trust indenture.

The Supreme Court concluded that New York law governed the validity of the exercise of the power under the trust indenture. It also held, however, that the Full Faith and Credit Clause required recognition of the California order and directed payment of the corpus to the California executor under the Acheson will. The Appellate Division unanimously affirmed without opinion (34 A D 2d 619).

It is a settled concept, obtaining in California and New York alike, that property subject to a general testamentary power of appointment passes to the designated appointees not through the donee's estate but directly from the donor's trustee. (In contrast, in the case of a general power presently exercisable, the rule is otherwise [EPTL 3-5.1, subd. (g), par. (1); 5 Scott, Trusts, 3d ed., § 635, at p. 4037].) Under the common law "conduit or agency" theory of powers, the donee in exercising the power is deemed an agent appointing property belonging to the donor. The trust indenture incorporates by reference the dispositive portion of the donee's will, or, expressed in terms of the doctrine of relation back, the appointment under the power is read into the instrument granting the

power. (*Gray v. Union Trust Co.*, 171 Cal. 637, 639-640; *Estate of Masson*, 142 Cal. App. 2d 510, 512; *Estate of Baird*, 135 Cal. App. 2d 343, 345; *Estate of Baird*, 120 Cal. App. 2d 219, 227-229; *O'Neil v. Ross*, 98 Cal. App. 306, 321; *cf. Estate of Newton*, 35 Cal. 2d 830, 832, 834-835, *Bishop v. Bishop*, 257 N. Y. 40, 51; *Chase Nat. Bank v. Central Hanover Bank*, 265 App. Div. 434, 441; 3 Restatement, Property, Introductory Note to ch. 25, at pp. 1811-1815; 45 N. Y. Jur., Powers, §§ 32, 50; 39 Cal. Jur., 2d Powers, § 3; 5 Scott, *op. cit., supra*, § 635; 5 American Law of Property, § 23.3.) Consequently, it misstates and distorts the legal analysis to describe the California court as concerned with the "meaning and interpretation of language used by [its domiciliary] in disposing of *his personal property* by will", reasoning adopted by the majority (A27).

Consistent with this view, the devolution of appointive assets of a trust having New York as its state of administration would be determined in an independent New York proceeding, and the intrinsic validity, effect, and interpretation of the instrument purporting to exercise the power would be governed by the New York law (EPTL 3-5.1, subd. [g], par. [2]). In the case of the nonresident donee, no determination by the foreign domiciliary court in its probate proceeding would affect the New York proceeding. (*Matter of Bauer*, 14 N Y 2d 272; *Matter of Franciscus*, 12 Misc. 2d 335, 337; *Matter of Walbridge*, 178 Misc. 32, 37 [FOLEY, S.] and cases cited; *Matter of Rogers*, 168 Misc. 633, 642-643 [FOLEY, S.]; *Matter of Harriman*, 124 Misc. 320, affd. 217 App. Div. 733. See, generally, Restatement, Second, Conflict of Laws [Proposed Official Draft, part III, April 22, 1969], § 274; 5 Scott, *loc cit., supra.*) In this context it is unprecedented and illogical to apply conflict rules governing wills as does the majority, in stating that the

courts will look to the law of the domicile in interpreting a testator's will in disposing of *his personal property*. The applicable rules are those dealing with powers, whether or not exercised by will, as the authorities cited indicate, and, indeed, as is precisely the doctrine in California (39 Cal. Jur. 2d, Powers, § 6).

Of course, the New York court's responsibility would be to apply the New York law to the alleged violation of the rule against perpetuities. The invalidity of the Acheson appointment under the New York rule is conceded and was inescapable. Perhaps sensitive to this inevitable conclusion respondents moved in the California court for a determination of the issue. Although all parties were before the New York court in this proceeding and the matter was otherwise ripe for decision, Special Term, for reasons not quite clear, and over the objections of appellants, reserved decision. Meanwhile the California court under its peculiar statutory cy pres power gave a validating interpretation to the exercise of the power, a result concededly beyond the reach of a New York court (compare West's California Civil Code, § 715.5 with EPTL 9-1.3; see Commentary to EPTL 9-1.3, McKinney's Cons. Laws of N. Y., Book 17B, 1970-1971 Supp., at p. 79).[7]

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[7] It is most interesting that Professor Richard R. Powell has caustically criticized the type of *cy pres* statute adopted by California and nine other States as creating a general judicial power to rewrite dispositions, barefaced, and not saved by the obviously hollow reference to a "general intent" belied by the very instrument being interpreted. (How Far Should Freedom of Disposition Go?, 26 Assn. of the Bar Record 8, 14-15, Jan., 1971). It is, therefore, hard to accept the majority's soft acceptance that the California court could find "on the facts before it" that Acheson had the "general intent" ascribed to him, and hardly conceivable that a New York court could have similarly found on the facts and not suffered reversal as a matter of law

Had the matter not gone any further the California order could not have precluded the appellants from litigating the effectiveness of the exercise of the power since they had never appeared in response to extraterritorial notice. However, appellants made a post-judgment motion to vacate the California order. Under the greater weight of California authority, such a motion constituted a general appearance conferring personal jurisdication over them. (For California decisions holding that a motion to vacate a judgment on the merits under section 473 of the California Code of Civil Procedure constitutes a general appearance in the prior proceedings, see *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*; 126 Cal. 418, 421-423; *Bank of America v. Carr*, 138 Cal. App. 2d 727, 734-736; *Shelley v. Casa De Oro, Ltd.*, 133 Cal. App. 720, 723; *Farmers and Merchants Nat. Bank v. Superior Court*, 25 Cal. 2d 842, 846-847; but *cf.*, *Bunnell v. Wynns*, 13 Cal. App. 2d 114, 117; *Batte v. Bandy*, 165 Cal. App. 2d 527, 539. See, generally, Lurvey, General Appearance after Default, 19 Hastings L. J. 541; Restatement, Judgments, § 19, Comment *a*; 5 Am. Jur., 2d, Appearance, §§ 14, 16, 30-34; Ann., Motion to Vacate Judgment or Order as Constituting General Appearance, 31 ALR 2d 262.)

Thus, the issue is whether the California order limits the powers of the New York court to make an original determination based on New York's rules. Because the California order was jurisdictionally infirm, it was not entitled to recognition in New York. The California court lacked competency to determine the matter before it, lacking jurisdiction over *inter vivos* trusts. California and its courts also lacked subject-matter jurisdiction. Moreover, an indispensable party, namely, the New York trustee, was absent.

The California Superior Court, sitting in probate, is a court of limited jurisdiction (*Estate of Bissinger,* 60 Cal. 2d 756, 764; *Estate of Wise,* 34 Cal. 2d 376, 381; *Estate of Stone,* 170 Cal. App. 2d 533, 535). Although given continuing subject-matter jurisdiction over testamentary trusts (California Probate Code, § 1120), it does not have jurisdiction over an *inter vivos* trust (*Auslen v. Superior Ct.,* 58 Cal. 2d 820, 823; *Estate of Rey,* 31 Cal. App. 2d 648; *cf. Wilkerson v. Seib,* 20 Cal. 2d 556, 562; but see California Probate Code, § 1137 *et seq.,* as last amd., taking effect Nov. 1, 1970). Consequently, the elliptical statement in the majority opinion that the California Superior Court is a court of unlimited general jurisdiction is an unacceptable premise. It is, except when it sits in probate matters, and the California court in this case was sitting in probate. There is a precise parallel in the jurisdiction of New York Surrogate's Court. For this reason a discussion of the New York statute and cases is relevant.

The rule frequently applied is that the Surrogate's Court lacks jurisdiction over *inter vivos* trusts (*Matter of Lyon,* 266 N. Y. 219, 222-224; 1 Warren's Heaton, Surrogates' Courts, § 33, par. 11, cl. [a]; § 35, par. 3, § 36, par. 5, cl. [dd]). In *Matter of Lachlan* (8 A D 2d 635, revg. 16 Misc. 2d 80) the Surrogate was called upon to determine if the decedent had by will exercised a power of revocation over an *inter vivos* trust. The Surrogate denied a motion to dismiss for lack of jurisdiction holding that the issue related to "the affairs of the decedent" citing section 40 of the Surrogate's Court Act (now SCPA 201). The Appellate Division reversed, holding that "The legal effect of the will upon the *inter vivos* trust may not be determined by means of a construction of the will by the Surrogate. The

question is for the Supreme Court" (*id.*, at 636; *cf. Matter of Mitchell*, 54 Misc 2d 1038, 1039).

Similarly, in *Matter of Crosby* (136 Misc. 688 [FOLEY, S]) the Surrogate held jurisdiction lacking to determine if decedent had properly exercised a power of appointment in an *inter vivos* trust. He held that the assets would pass under the trust instrument and not the will, and that the validity and effect of the exercise of the power, therefore, must be determined by the court which has "jurisdiction to construe the instrument originally creating the power" (*id.*, at 689). (See, also, *Matter of Martin*, 58 Misc 2d 740; *Matter of Gray*, 176 Misc. 829, 834-835 [FOLEY, S], affd. 266 App. Div. 732, affd. 292 N. Y. 532.)

The same approach to the limited competency of the Superior Court, sitting in probate matters, is taken in California (*Estate of Cox*, 8 Cal. App. 3d 168). The issue presented to the Superior Court, sitting in probate, in part in an heirship proceeding, was whether the decedents had exercised powers of appointment over a corpus of an *inter vivos* trust. The court concluded that the probate court was without jurisdiction. Referring to the general rule, so critical in this case too, that appointees take from the original donor of the power and not the donee, the court stated that "the question of the exercise or non-exercise of the power . . . is uniformly passed upon by a court of general jurisdiction" (*id.*, at 181). Quoting from a California Supreme Court opinion, it concluded " 'it would not be the court in probate which would determine to whom the trust property should go. The class entitled to take would be determined by a court of equity in an action brought by the trustee to determine that precise question ' " (*id.* citing *Gray v. Union Trust Co.*, 171 Cal. 637, 640, *supra*).

In this case the respondent, Bank of America, initiated an heirship proceeding solely for the purpose of adjudicating the property rights of the several beneficiaries under the trust indenture. The *Cox* case, *supra,* as well as the cases cited in it, unequivocally indicate that the Superior Court, qua Probate Court, was without such jurisdiction.

It is fundamental, of course, that a court lacking competence in the forum state to determine an issue is without power to render a judgment valid at home, or entitled anywhere else to comity or full faith and credit. Its judgment is a sterile vanity. Nor is lack of competence in a court a defect curable by waiver, estoppel, or *res judicata.* (*Matter of Trevor,* 309 N. Y. 389, 394; Restatement, Judgments, § 7, Comments *a, d;* Restatement, Second, Conflict of Laws [Proposed Official Draft, Part I, May 1967], § 105,) In short, the California order is a nullity there and it is strange, indeed, that it be accorded full faith and credit or even comity here.

This should be the end of the matter, but there is further infirmity in the California order.

When a dispute involves the interests of other states, a court seized with the dispute must weigh the coordinate responsibilities of the several states. In most instances, the dispute is resolved by the forum's choice of law; in others by abstention, based either on *forum non conveniens* or comity; in still others, by a mandatory declination of jurisdiction based on the absence of subject-matter jurisdiction. It is well settled that at the trust situs there is primary judicial jurisdiction for the determination of disputes involving the validity, interpretation, and administration of the trust (Restatement, Second, Conflict of Laws [Tent. Dr. No. 4], § 108a, Comment *d;* 5 Scott, *op. cit., supra,* §§ 564-566. Of course, this is not to say that the State of the trust situs has exclusive judicial jurisdiction to deter-

mine questions in the administration of the trust. There are well-settled instances where other courts have properly exercised jurisdiction over such trust matters (5 Scott, *op. cit., supra,* §§ 565-568, 571; Restatement, Second, Conflict of Laws [Proposed Official Draft, Part III, April 22, 1969], § 267, Comment *d;* see, generally, Ann., Trust—Jurisdiction of Suit, 15 ALR 2d 610). As stated in Restatement, Second, the jurisdiction of the court of primary supervision "is not exclusive, and the courts of other states may exercise jurisdiction in proper cases if they have jurisdiction over the trustee or if they have jurisdiction over the trust assets insofar as interests in those assets are concerned" (*id.,* p. 174; see, in agreement, 8 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 7701.10). A corollary is that "equity has no jurisdiction of a suit relating to a trust where the trust was created outside the jurisdiction of the court and where the trustee and trust *res* are both beyond such jurisdiction" (54 Am. Jur., Trusts, § 565, p. 440).

Exceptions are limited to where either the *res* or trustee were before the foreign court and where failure of justice would follow if equity withheld relief (Ann., Trust—Jurisdiction of Suit, 15 ALR 2d 610, §§ 3, 10, 20, 27). Neither the trustee nor the trust *res* were before the California court.

Applying these principles the want of jurisdiction on the part of the California court to hear and decide the matter is apparent. Although attempts are made to establish, somehow, a California situs by asserting an in rem adjudication based merely on the exercise of the power in California, it fails because that is not enough. Nor is this a case where the California court is seeking to reach the beneficial interest of a trust beneficiary residing in California. Under the settled rule, discussed earlier, the donee of a testamentary power has no ownership in the appointive

property. The property remains part of the trust corpus, ownership of which is evidenced by documents of title held in New York by a New York trustee. Moreover, the arrogation by a court of judicial jurisdiction in rem may not depend solely upon the exercise of a power of appointment by a domiciliary. Considerations of "the coordinate authority of sister states" also plays a role in assigning in rem jurisdiction over a *res*, specially of intangibles (*Hanson v. Denckla*, 357 U. S. 235, 246-247). Since the exercise of in rem jurisdiction over a New York trust by a California court would represent a substantial impairment of New York's supervisory control over its own trusts, this factor alone precludes the existence of such jurisdiction:

The exact limits of the coordinate equity jurisdiction of other state courts to adjudicate with reference to interests and responsibilities flowing from a New York trust indenture need not now be considered. It suffices that under the present circumstances the California court was without power to decide the matter committed to it by the respondents-appointees. Subject-matter jurisdiction lacking, the California order is not entitled to recognition under the Full Faith and Credit Clause, or even as a matter of comity.

The same result is reached upon a different analysis.

Section 389 of the California Code of Civil Procedure provides in relevant part:

> "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties".

As construed by the California Supreme Court, if a complete determination of the controversy cannot be had without the presence of another party, such party is indispensable and the court may not proceed without his presence

(*Ambassador Petroleum Co. v. Superior Ct.*, 208 Cal. 667, 671-672).

The general rule is that the trustee of an *inter vivos* trust is an indispensable party in any proceeding where judicial consideration is to be given the administration, validity, or disposition of the trust *res* (*Hanson v. Denckla*, 357 U. S. 235, 245, *supra; McArthur v. Scott*, 113 U. S. 340, 396; *Sadler v. Industrial Trust Co.*, 327 Mass. 10, 13; 1 Freeman, Judgments, § 499 and cases cited; *cf.* 3A Moore's Fed. Prac. [2d ed.], par. 19.08, at pp. 2297-2299, par. 19.19, at p. 2581). Whether this general principle is applicable involves a consideration of the law of the rendering State.

The cases relied upon by the respondents-appointees to show that the trustee is not indispensable not only fail to support such a proposition but inferentially suggest, if not compel, its antithesis. In *Muggill v. Reuben H. Donnelley Corp.* (62 Cal. 2d 239 [TRAYNOR, Ch. J.]) a former employee sought reinstatement in the employer's retirement plan. The plan was controlled by the corporation through a retirement committee and trustee. The trustee was a nonresident and not amenable to personal service. The issue was raised as to the court's power to enter judgment without the trustee's presence. The court concluded that when the powers of the trustee are subject to the complete control of the creator, and, significantly, the creator was presently before the court, the trustee's presence is not required in order to resolve the dispute between the employee and the corporation (*id.*, at 241-242). The California Supreme Court stated that were it to conclude that the non-resident trustee was indispensable under the facts of the case "corporations could evade their obligations under retirement plans merely by naming nonresidents as . . . trustee." (*Cf., Thorson v. Western*

Development Corp., 251 Cal. App. 2d 206, 215, for the statement that "A trustee under a deed of trust [is not] an indispensable party in an action brought by a beneficiary when the interest or powers of that trustee concerning the trust *res* are subject to the control of the trustor.")

Both cases represent an application of a well-recognized exception to the general rule of indispensability of trustees. Where the trustee's powers and duties are minimal thus approximating a mere stakeholder, the trustee is not indispensable in an action involving the trust corpus (*Salem Co. v. Manufacturers' Finance Co.*, 264 U. S. 182, 190; *San Diego Water Co. v. Flume Co.*, 108 Cal. 549, 556, 557; *Rabinowitz v. Kaiser-Frazer Corp.*, 111 N. Y. S. 2d 539, 547-548; 54 Am. Jur., Trusts, § 590; 90 C. J. S., Trusts, § 366).

The *ratio decidendi* of the cited California cases, namely, that the trustee was analogous to a passive trustee subject to the complete control of the creator of the trust, is inapplicable. If the exception for indispensability is limited to a trustee who is no more than an alter ego of the controlling party before the court, he is, on the contrary, an indispensable party if he has powers independent of the settlor. Such is the situation in this case. Hence, the presence of the trustee was necessary before the California court could adjudicate the rights of the beneficiaries (see, *e.g.*, *Drath v. Armstrong*, 224 Ala. 661; *Lewis v. Hanson*, 36 Del. Ch. 235, 255, 261, affd. *sub nom. Hanson v. Denckla*, 357 U. S. 235; *Northern Natural Gas Co. v. Hugoton Plains Gas & Oil Corp.*, 55 Del. 348, 355; *Illinois Nat. Bank v. Gwinn*, 390 Ill. 345; *Matter of Young v. Ledden*, 7 A D 2d 946, 947; 54 Am. Jur., Trusts, § 584; 90 C. J. S. Trusts, § 366; *cf. Dolese Bros. Co. v. Brown*, 39 Del. Ch. 1, 9; 3 Carmody-Wait, 2d, New York Practice, §§ 19.22, 1940).

Practical considerations also commend this conclusion. To permit the respondents-appointees in this case to succeed in their attempt to circumvent New York's primary responsibility for its trusts encourages litigants similarly situated in the future to race to other forums sponsoring more favorable rules of construction. Such a practice fosters mutiplicity of litigation and might lead to inconsistent results among differing groups of beneficiaries. The risk of such practice increases where the alternative beneficiaries are also interested in the nonresident donee's estate. In such instances the alternative beneficiaries are left with a Hobson's choice: appear in the domiciliary probate proceedings to protect estate interests and risk an adjudication by the out-of-state court respecting the exercise of the power, or, forego protection of estate interests in order to protect whatever contingent interest they have in the appointive property. Moreover, normally incidental to this species of litigation is an intra-familial dispute between the donee's appointees, usually his wife and issue, and the alternative beneficiaries, usually collaterals of the appointees and issue of the doner. In such disputes it is more desirable that the State of administration decide the matter rather than, perhaps, an interested forum which might favor its residents over the nonresident contingent beneficiaries.

Other injustices come to mind. It may not always be the necessary designated appointees who invoke the aid of a foreign forum. The alternative beneficiaries might seek in invalidating interpretation of the power by resort to a forum whose rules of construction require that the power be specifically exercised, whereas New York, the State of administration, would presume exercise in favor of the residuary estate. Such a decree of invalidity, if honored, would not only deprive the appointees of the appointive

assets, but most likely thwart the donor's justified reliance upon New York rules governing the exercise of powers.

These considerations when combined with the unnecessary interference by the California court in the administration of the trust, particularly after New York's primary jurisdiction had attached and the matter was *sub judice,* compel nonrecognition of that court's decree. Nor may the risks be limited by the solemn injunction that the facts in this case are "special and unique". In a sense, the facts of every case are "special and unique" but the rules they imply are insuppressible in this as in every other case. And so long as jurisprudence impels like handed treatment for like situations, universals from particular facts will be extruded and give precedential status to any holding, and to this one too. Characterization of facts as special and unique serves only a vain attempt to lay down a one-case rule.

Accordingly, I dissent and vote to modify by reversing so much of the order as adopted the order of the California Superior Court and directed distribution of the corpus and accrued interest to the California executor, and dismissing as moot and unreviewable the appeal from that portion of the final order respecting the issuance of a commission.

* * *

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the trust. Opinion by Fuld, Ch. J. All concur except Breitel, J., who dissents and votes to modify in an opinion in which Burke and Jasen, JJ., concur.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF NEW YORK

In the Matter
of
the Settlement of the Final Account of Proceedings of MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee under an Indenture of Trust dated December 19, 1935 made by MARGARET MAHER ACHESON for the Benefit of EDWARD GOODRICH ACHESON, III.

Index No. 13186/66.

Opinion of New York Supreme Court, New York County

GELLINOFF, J.:

This is a proceeding for judicial settlement of the final account of the trustee of an *inter vivos* trust, and for other relief. The controversy involved pertains to the exercise by a California resident of a power of appointment provided for in a trust indenture. The facts, material to determination, follow in chronological order.

On December 19, 1935, Margaret Maher Acheson, as settlor, and Guaranty Trust Company of New York (now known as Morgan Guaranty Trust Company of New York), as trustee, entered into a trust indenture. The settlor, a Florida resident, executed the instrument in Florida, and the trustee, a New York corporation, executed it in New York. The indenture created a trust for the life of settlor's son Edward Goodrich Acheson, Jr. Upon his death the trustee was directed to divide the corpus of the trust into six equal parts, to form four separate trusts, to be separately administered, with identical direction as to each said trust. In the indenture, the son, Edward Goodrich Acheson, Jr., is called "First Beneficiary"; and the named

grandsons and a great grandaughter, for whose benefit the four separate trusts are directed to be set up on the death of the "First Beneficiary", are collectively called "Second Beneficiaries".

The indenture provides that the income of the trust for the benefit of the First Beneficiary (Edward Goodrich Acheson, Jr.) shall be paid to him during his life; and that the income of each of the four trusts set up for the benefit of each designated and named Second Beneficiary (settlor's grandsons and great granddaughter) shall be paid to the respectively designated beneficiary during his or her life.

As to the corpus of each trust for the benefit of its respective Second Beneficiary, the indenture grants each said Second Beneficiary the power of appointment, to be exercised by his or her will. The indenture further provides that "if such grandson (or grant granddaughter) shall fail effectually so to dispose of the corpus of such part so allocated to him (or her), Trustee shall distribute the corpus of such part to the persons to whom, and in the same manner and proportions as, his (or her) personal estate would be distributed in case of his (or her) intestacy".

On June 11, 1943 this court, by final order, judicially settled the trustee's intermediate account (covering the primary trust) for the period from December 21, 1935 through January 15, 1942.

On January 5, 1962 Edward Goodrich Acheson, Jr. (the First Beneficiary) died a resident of Florida, and his last will and testament and codicil thereto were, on January 18, 1962, admitted to probate in the County Judge's Court of Florida. On his death, the trustee under the trust indenture, allocated the trust corpus to the respective four separate trusts as required by the indenture, and the trustee continued to function as such for each separate trust.

On November 30, 1962 this court, by final order, judicially settled the trustee's intermediate account for the period from January 16, 1942 through September 7, 1962.

On November 13, 1965, Edward Goodrich Acheson, III (one of the Second Beneficiaries—a grandson or settlor) died a resident of California, and the instant proceeding concerns only the trust set up for his benefit; it is the power of appointment exercised by him under his will in California, which is the subject matter of the dispute.

Edward Goodrich Acheson, III, left him surviving a widow, an infant daughter by their marriage, and five children of earlier marriages. His last will and testament dated May 18, 1965, designating the Bank of America National Trust and Savings Association of California as his executor, was on January 4, 1966, admitted to probate in the California Superior Court.

By his said will be assumed to exercise the power of appointment under the trust indenture here involved "to its fullest extent in favor of my residuary estate". He divided his residuary estate into two trusts. "Trust A", for the benefit of his widow, was to consist of an amount equal to her share of community property less the value of community property specifically bequeathed to her elsewhere in the will. "Trust B", for the benefit of his infant daughter, was to consist of the balance of the residuary estate.

"Trust A" was to terminate on the death of the widow, Helen F. Acheson. "Trust B", for the benefit of the infant daughter Linda Belle Acheson, was to terminate as follows:

> "Any other provision hereto to the contrary notwithstanding, this Trust shall fully cease and terminate twenty-one (21) years after the death of the last survivor of my wife, Helen F. Acheson, my daughter,

> Linda Belle Acheson, and the children of my said daughter, living at the time of my death."

Of all interested parties in this proceeding only Linda Belle Acheson had not yet been born when the trust indenture here under consideration was executed.

On August 1, 1966 the trustee under the trust indenture commenced this proceeding seeking a settlement of its final account under the separate trust for the benefit of Edward Goodrich Acheson, III, for the period from February 6, 1962 through June 30, 1966. On this accounting proceeding, the trustee also requests a final order "construing said Indenture and the Will of Edward Goodrich Acheson III and instructing and directing" the trustee "as to the persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable."

The Special Guardian for the infant Linda Belle Acheson filed his report on June 25, 1967, advising this court that a proceeding was still pending and undetermined in the California Superior Court, which, the Special Guardian suggested, "will be determinative of the manner in which such Testator [Edward Goodrich Acheson, III] exercised the power of appointment granted to him under the initial trust indenture."

It appears that, on March 20, 1967, in the California Superior Court, the executor of the will of Edward Goodrich Acheson, III, filed its petition for instructions. Included in the petition was request,

> "That an interpretation be given to the provisions set forth in paragraph VI [of the will of Edward Goodrich Acheson, III] so as not to violate the rule against perpetuities and bring said Trust within the rule of perpetuities, that is, that said provision requires termination of the Trust and distribution of the assets received in Trust from the appointive funds within twenty-one years from the death of Helen F.

Acheson, the surviving spouse, if not sooner terminated by the death of Linda Belle Acheson."

On May 3, 1967, in the California Superior Court, the executor of the will of Edward Goodrich Acheson, III, filed an amended petition for instructions and for determination of heirship. The requested instructions in the amended petition, in practical effect, duplicate the original petition; and the requested determination of heirship, in practical effect, sought adjudication that no court had as yet passed upon the rights of those claiming interests in the estate of Edward Goodrich Acheson, III.

On September 18, 1967, in the California Superior Court, an order (instruction order) was entered on default. After reciting a finding of due notice of the application, the order, so far as here pertinent, instructed the executor of the will of Edward Goodrich Acheson, III, as follows:

"(1) The executor Bank of America National Trust and Savings Association is hereby instructed to file its Inventory, including the appointive assets held in the Margaret Maher Acheson Trust; * * *

"(3) It has been determined from the evidence that: * * *

"(c) Paragraphs third, eighth and ninth of the Will [of Edward Goodrich Acheson, III, one of the second beneficiaries under the trust indenture] clearly express the testator's intention to disinherit and deny any benefit from or share in the assets over which he had testamentary control, all heirs at law of the testator other than his wife, Helen F. Acheson, and the issue of his marriage to her, unless neither she nor any issue of said marriage survived the testator;

"(d) The Will fully expresses the testator's intent to exercise his power of appointment under the Margaret Maher Acheson Trust, since, in paragraph sixth, after referring specifically to his power of appoint-

ment under the trust, the will states, 'It is my intention to exercise each such power of appointment to its fullest extent in favor of my residuary estate,' which is devoted exclusively to the trusts for the benefit of the testator's wife, Helen F. Acheson, and the issue of their marriage;

"(e) The obvious intent of the testator expressed in that part of paragraph SIXTH which reads as follows:

> Any other provision hereto to the contrary notwithstanding, this Trust shall fully cease and terminate twenty-one (21) years after the death of the last survivor of my wife, Helen F. Acheson, my daughter, Linda Belle Acheson, and the children of my said daughter, living at the time of my death

is that the residuary trust be curtailed, if necessary, to preserve the testamentary plan to the fullest extent possible from invalidity under the rule against perpetuities; * * *

"(g) Accordingly, the provisions of paragraph SIXTH set forth in subparagraph (e) above are to be construed as requiring that any trust still subsisting under the Will twenty-one years after the death of Helen F. Acheson then terminates as to all assets in such trust derived from Margaret Maher Acheson Trust".

On March 15, 1968, in the California Superior Court, the five children of Edward Goodrich Acheson, III, by his earlier marriages (hereinafter called "Group 1" respondents on this accounting proceeding, as distinguished from Edward Goodrich Acheson, III's executor, widow and infant child, hereinafter called "Group 2" respondents on this accounting proceeding), filed application under the California Code of Civil Procedure section 473, which in part provides,

> "The court may * * * relieve a party * * * from a judgment, order, * * * taken against him through his mistake, inadvertence, surprise or excusable neglect."

The Group 1 respondents by their application sought to be relieved of the California instruction order of September 18, 1967, and sought permission to file their "statement Setting forth [their] Interests" in the estate. They contended that the purported exercise by Edward Goodrich Acheson, III, of the power of appointment violated the rule against perpetuities, and that the construction found by the court was based on incorrect factual assumption as to the intent of the testator. In their application the Group 1 respondents also requested *affirmative* relief for an order directing that:

> "1. Executor not inventory and take charge and control of any of the property of the Margaret Maher Acheson trust and that said assets not be used by executor for any purpose;
>
> "2. The provision of paragraph sixth of decedent's will be held to violate the rule against perpetuities and the purported exercise of the power of appointment be invalid".

On June 5, 1968, in the California Superior Court, at the hearing on said application, there were present the attorneys for the Group 1 respondents and the attorneys for the Group 2 respondents. At the close of the hearing decision was reserved.

On August 13, 1968, in the instant proceeding pending before this court, the Group 1 respondents moved for issuance of a Commission to take testimony in California of the widow, of two officers of the California executor, and of the California attorney for the widow and the executor,

presumably to support their various contentions that the California Superior Court orders ought not be accorded full faith and credit by this court in the instant accounting proceeding in this court. This court held its decision on that application in abeyance pending determination by the California Superior Court of the aforesaid application by the Group 1 respondents to be relieved of the California instruction order of September 18, 1967.

On October 4, 1968, in the California Superior Court, an order was entered denying the application of the Group 1 respondents to vacate the instruction order, that court finding that the default by the Group 1 respondents in opposing the application (resulting in the instruction order) was not due to excusable neglect, surprise, mistake, or extrinsic fraud, but rather to a calculated strategic omission.

That order specifically recites that there was no need to rule, and that the California court did not rule on the substantive issue as to whether under California law there would have been different construction of the will and different instruction to the executor had the application resulting in the instruction order been contested.

On October 23, 1968 this court requested that the records in the California Superior Court proceedings be made available to this court, and that proof by affidavits of California attorneys as to the applicable California law be submitted, as decision in the matter pending before this court was not otherwise possible. Such data is now before this court.

The Special Guardian for Linda Belle Acheson and the Group 2 respondents take the position that the Trust corpus should be paid over to the executor of the will of Edward Goodrich Acheson, III, to be administered by his executor. In practical effect, they seek recognition by this court of

the California instruction order. The Group 1 respondents, on the other hand, take the position that the exercise of the power of appointment was void, and that the trust corpus should be distributed as in case of intestacy. In the light of the foregoing background facts, the issues presented may now be considered.

It is not disputed that the indenture is to be dealt with as a New York trust. The indenture itself requires administration of the trust (at least until substitution of a new trustee) by a New York trustee. It further provides that, except as to the original contribution of trust corpus,

> "Any moneys, however, at any time constituting any part of the trust estate or trust parts shall (except as aforesaid [referring to the securities then being transferred to the trustee]) be invested and from time to time reinvested in such investments only as are lawful for the Trustees under the laws of the State of New York."

Notwithstanding that the settlor was a Florida resident, and although the trust indenture does not direct that it be treated with under New York law, this court holds that the settlor intended New York law to be applicable to the trust indenture and to the validity of the exercise under the indenture of the power of appointment. Accordingly, the determination as to the validity of the exercise of such power of appointment, and necessarily as to the disposition of the trust corpus, is a function to be exercised only by the New York courts. [*Matter of Bauer*, 14 N Y 2d 272; *Hutchinson v. Ross*, 262 N. Y. 381; *Matter of New York Life Insurance Co.*, Estate of Hallgarton, 139 N. Y. S. 695, aff'd 157 App. Div. 916, aff'd 209 N. Y. 585; *Matter of MacKelvie*, 24 A D 2d 744; *Matter of Pratt*, 5 A D 2d 501; *In re McCampbell's Trust*, 36 Misc. 2d 108; *In re Harriman's Estate*, 124 Misc. 320 aff'd 217 App. Div. 733.]

Ordinarily, then, this would end the matter; for the purported exercise by Edward Goodrich Acheson, III, of his power of appointment under the trust indenture, placing the trust corpus in further trust for the life of his infant daughter (who was not born until October 16, 1949, some 14 years after the trust indenture was executed) violated the New York rule against perpetuities [*Real Property Law* § 154 (now EPTL 9-1); *Personal Property Law* § 11 (now EPTL 9-1.1); *Law v. Bankers Trust Co.*, 270 N. Y. 143; *In re Cordier's Trust*, 6 Misc. 2d 914; see also California Civil Code § 715.2]. Under New York law, if the purported exercise of the power of appointment is ineffectual, the appointive property is distributable to the persons designated to take in such event [*In re Norrie's Will*, 27 Misc. 2d 454; *In re Coffin's Will*, 168 N. Y. S. 2d 793; *In re Phelps' Trust*, 159 N. Y. S. 2d 55; *In re van Hoesan's Will*, 67 N. Y. S. 2d 503].

The fact remains, however, that proceedings were had in the California Superior Court incident to the trust indenture; and this court must now determine, on this proceeding, what effect this court is required to give to those related California proceedings.

The California Superior Court is a court of unlimited, general (including probate) jurisdiction; and it will exercise jurisdiction and administer the estate of a decedent who at his death was either a California resident or had property with a California situs. [*California Probate Code*, §§ 301; 302.]

A California probate proceeding is essentially *in rem; in personam* jurisdiction is not required; and published notice is sufficient. The California probate decree which admitted the will of Edward Goodrich Acheson, III, to probate is an adjudication merely that he died a California

resident or that at his death he had property with a California situs, and that there was sufficient notice of the probate proceeding. The probate decree is "binding upon persons who are not parties to or participants in the proceeding only so far as the status, title or other *res* constituting the subject matter is adjudicated." (*Estate of Bloom,* 213 Cal. 575.) In short, in probating the will of Edward Goodrich Acheson, III, the California Superior Court, did not even purport to pass upon the validity of the exercise of the power of appointment.

With respect to estate administration, the California Superior Court has jurisdiction to interpret a will, to resolve ambiguities in a will, and to determine upon the persons entitled to share in the estate. The amended petition filed by Edward Goodrich Acheson, III's executor, which included a request to determine heirship, is the procedure for invoking that judicial function (*California Probate Code* § 1080).

As earlier stated, the California Superior Court entered a final order instructing the executor to include the appointive assets in its inventory, and interpreted the will in such manner as to expressly hold that the exercise by Edward Goodrich Acheson, III, of the power of appointment under the trust indenture did not violate the rule against perpetuities, presumably (though not expressly stated) either under New York law or under California law.

The Group 1 respondents contend that this California Superior Court instruction order ought not be given full faith and credit in the proceeding pending before this court because of the following:

first, the amended petition lacked complete revelation of essential and material data and showed no such ambiguity in the will as required exercise by the court of its discretion to assume to interpret and resolve ambiguities in the will;

second, there was no *in personam* jurisdiction in the proceeding for the probate of the will, or in the proceeding for the requested instructions and interpretation of the will, and the application later made by the Group 1 respondents for relief from the instruction order did not operate retroactively to confer such *in personam* jurisdiction; and

third, in any event, the New York trustee was not a party to the California proceeding for probate of the will or the proceeding for requested instructions and interpretation of the will.

These contentions are apparently rested on the majority opinion in *Hanson v. Denckla* (357 U. S. 235). The majority opinion in that case holds that in the factual situation there before the court, the Florida decree was not entitled to full faith and credit in Delaware because the *res* was not in Florida, there was no *in personam* proceeding in Florida, and there was no jurisdiction in Florida of all persons concerned with the trust estate.

Since this court is of the opinion that the decision in the *Hanson* case is not determinative of the issues presented by the special and peculiar facts of the case at Bar, an analysis of the *Hanson* case is necessary.

In the *Hanson* case the facts were these. The settlor, a Pennsylvania resident, executed her trust indenture, in which the Wilmington Trust Company of Delaware was designated as trustee. She reserved to herself the right to appoint the trust corpus by will *or otherwise.* While still

a Pennsylvania resident, she executed her *inter vivos* power of appointment in which she appointed a portion of the trust corpus to two other Delaware trusts which had been created by her daughter for the benefit of the daughter's children. Up to this point, then, Florida was a complete stranger to the trust indenture and to the exercise of the power of appointment.

Later, the settlor became and continued to be until her death a Florida resident. After the settlor's death two separate and, in practical effect, identical proceedings were instituted, one in Florida and the other in Delaware, for the purpose of determining upon distribution of the trust corpus. In the Florida proceeding the settlor's daughter and the daughter's children appeared after they were personally served in Florida. But the trustee and the other non-resident defendants who were served only by publication did not appear.

During the pendency of the Delaware proceeding, a decree was entered in the Florida proceeding determining that the appointive property passed under the residuary clause of the settlor's will. The Florida decree was asserted to be entitled to full faith and credit in the Delaware proceeding. The Delaware court held that the Florida decree was not entitled to full faith and credit because there was no jurisdiction of the *res* and there was no *in personam* jurisdiction of the Delaware trustee.

Both the Florida decree and the Delaware decree were reviewed by the United States Supreme Court after grant of certiorari. Five members of the court held that the Florida decree was not entitled to full faith and credit in Delaware and four members of the court held that it was entitled to such full faith and credit.

While there is some similarity between the factual situation before the court in the *Hanson* case and that in the proceeding pending before this court, there are substantial and material differences.

Obviously, as to any matter concerning the trust indenture and the power of appointment created thereunder, the settlor's intention should be given effect. The settlor in the proceeding pending before this court attached in her trust indenture special and significant affiliation between the administration of the trust and the *residence* of a beneficiary, wherever it might be. For she actually provided for trust administration and for a trust corpus situs elsewhere than in New York, depending on the then residence of such beneficiary. Thus the trust indenture provides,

> "4. * * *. First Beneficiary or Second Beneficiaries may * * * in his or their discretion, at any time remove Trustee and appoint a successor trustee hereunder, * * * which shall, however, be a responsible bank or trust company organized under the laws of the State of New York or of the United States of America or of the state or country wherein First Beneficiary or Second Beneficiaries *may at such time reside*, * * * trustee shall account and turn over to such successor all assets of the trust estate or trust parts in its hands." (Italics supplied.)

Also, in the proceeding pending before this court the settlor, in her trust indenture, attached special and significant affiliation between the law of the country or state wherein a beneficiary then resided or was later to reside concerning the *administration of the estate of such beneficiary;* for her trust indenture specifically provides that the power of appointment was to be exercised *only* by last

will and testament, and that, failing effectual exercise thereof, the trust corpus was to be distributed as in intestacy. While the trust indenture does not specify the country or state whose intestacy law was to be operative, the settlor obviously intended that the intestacy law of the then residence of the beneficiary was to be operative.

The pertinent provision appears in paragraph "1" of the indenture, where, after providing for income for the Second Beneficiaries, she provides that, upon the death of a Second Beneficiary, the trust corpus should be distributed,

> "* * * in such manner as such grandson (or great granddaughter) by his (or her) last will and testament or any codicil thereto shall direct; and if such grandson (or great granddaughter) shall fail effectually so to dispose of the corpus of such part so allocated to him (or her), TRUSTEE shall distribute the corpus of such part to the persons to whom, and in the same manner and proportions as, his (or her) personal estate would be distributed in case of his (or her) intestacy."

Thus the settlor, when executing her trust indenture, in practical effect, provided that the trust administration and the trust corpus, upon the death of a beneficiary, should have direct and substantial affiliation with the country or state in which the beneficiary then resided; for the trust corpus would be subject to administration in the country or state of the residence of such decedent, through the will, if the power was effectually exercised and, outside the will, if the power was not effectually exercised. The settlor's intention, whenever possible should be given effect (*Shannon v. Irving Trust Company*, 275 N. Y. 95; *Hutchinson v. Ross*, 262 N. Y. 381).

While a New York court is empowered to administer the estate of a non-resident, and to direct distribution in accord with the intestacy law of another country or state, there is nothing in the trust indenture to indicate that the settlor intended New York as the *exclusive forum* for the administration of the estate of a Second Beneficiary; and the mere circumstance that the beneficiaries did not substitute a new trustee for the New York trustee, which they always were empowered to do under the trust indenture, does not alter the intent of the settlor as gleaned from the trust indenture.

Besides, there are many basic and substantial differences between the factual situation in the *Hanson* case and the factual situation in the proceeding pending in this court, some of which are now adverted to.

In the *Hanson* case the issue before the Florida court was as to the validity of the trust indenture; and the validity of the exercise of the power of appointment was in the case only because of the contention that such exercise "validated" the trust indenture. The Florida court did not reach that contention for decision, as, under Florida law, exercise of a power of appointment is a testamentary act requiring compliance with certain formalities and, concededly, those formalities had been complied with. In the proceeding pending before this court, there is no issue as to the validity of the trust indenture.

In the *Hanson* case the settlor, in her trust agreement, did not attach any significant affiliation between the then or later residence of herself or of any beneficiary and the trust administration or the trust corpus. In the present proceeding, the settlor did attach significant affiliation between the then or later residence of a beneficiary and the trust administration and the trust corpus; and the settlor

contemplated that on the death of a beneficiary, there was to be trust administration, and likely, a trust corpus situs, elsewhere than in New York.

In the *Hanson* case Florida law required *in personam* jurisdiction over the Delaware trustee as a condition that the Florida court be "empowered to enter judgment in a proceeding affecting the validity of a trust." There is no such requirement in California. *The California Code of Civil Procedure* § 389 provides as follows:

> "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties."

Neither this statute nor any California case requires a holding that the California Superior Court is not empowered to determine a proceeding without the presence as a party of a non-resident trustee. Indeed, it is seriously doubted that California would construe its statute so as to require the presence of a non-resident trustee, whose only present interest in the proceeding is in practical effect that of a disinterested stakeholder. In any event, the ultimate determination as to distribution of the trust corpus by the trustee is to be made in the proceeding pending before this court.

In the *Hanson* case the Florida court never acquired *in rem* jurisdiction or *in personam* jurisdiction of the non-resident trustee and of other non resident defendants. In the special and unique situation, in the case at Bar, the California Superior Court had *in rem* jurisdiction because of the direct and substantial affiliation with the trust ad-

ministration and the trust corpus; and also had *in personam* jurisdiction, since the Group 1 respondents appeared generally on their application to vacate the instruction order.

After entry of the instruction order in the California Superior Court, the Group 1 respondents filed application under the California *Code of Civil Procedure*, § 473 for relief from the instruction order, requesting not only vacatur of the order, but requesting, also, affirmative direction; in practical effect they sought the same relief which they now seek in the proceeding before this court. These respondents urge that the instruction order ought not be given any effect in the proceeding before this court because the order denying their application to vacate the instruction order in California neither added to, nor detracted from, whatever effect the instruction order had before their application was made; and that (a) the application was merely for vacatur of the order; (b) their failure to oppose the original application was based on their opinion that the instruction order, whenever entered, would not be heeded by this court, and (c) the order denying their application to vacate the instruction order states: "it is not necessary to rule (nor do we) on the question as to whether there appears to be any merit under California law to the substantive position taken by the moving parties."

Certainly the Group 1 respondents did not intend their application for relief from the instruction order to be an idle gesture, for their application embraced specific request for affirmative direction, which, in practical effect, is the direction sought by them in the proceeding pending before this court. Their application was not a challenge to the jurisdiction of the court, either *in rem* or *in personam*. In the circumstances, it is not necessary to determine whether the application for relief from the instruction order was

an appearance "retroactively" as of the date when the instruction proceeding was instituted, or whether it was an appearance as of the date when their application for relief from the instruction order was made. In any event, their application, including request for affirmative relief, was later denied. It is the instruction order, now buttressed by the denial of their requested affirmative relief, which, together, must be considered in deciding whether the issues resolved in the instruction proceeding are entitled to full faith and credit in the proceeding pending before this court.

The application by the Group 1 respondents to vacate and for affirmative relief was not a challenge to the jurisdiction of the California Superior Court to enter the instruction order, but rather an invitation to reconsider it. Their application was not disposed of on any jurisdictional ground, but rather on a substantial procedural ground, to wit that the default resulted from a calculated omission. In the circumstances here present their application constituted a general appearance, which had "the effect of curing any defect arising from the lack of jurisdiction due to the failure to serve or notify a person of the proceedings." (*Farmers National Bank v. Superior Court,* 24 Cal. 2d 842.)

In the special and unique factual situation here present, it makes no difference whether the instruction proceeding was *in rem,* based on the constructive presence in California of the *res,* or *in personam,* based on the general appearance of all respondents. The instruction order, to the extent that it interprets the will by finding an intention on the part of the testator Edward Goodrich Acheson, III, to limit the duration of the trusts so that it be deemed not in violation of the rule against perpetuities, is entitled

to full faith and credit as concerns all respondents in the proceeding pending before this court.

The California instruction order is not entitled to full faith and credit in the proceeding pending before this court as against the trustee, whether the instruction proceeding be deemed *in rem* or *in personam,* for the trustee was not a party and it did not appear in such proceeding. The instruction order does not purport to direct the trustee to turn over to the California executor the trust corpus, but rather directs the California executor to receive the trust corpus, if, as and when, such turnover is directed in the proceeding before this court. But this is of no moment here, as the trustee has very properly assumed the role of a disinterested "stakeholder", awaiting instructions by the final order to be entered in the proceeding pending in this court.

This court adheres strictly to the established precedent, that a New York trust indenture, consistent with the intent of the settlor, should be treated with in accordance with New York law; and that the judicial settlement of a trustee's account and the instructions to the trustee as to the distribution of the trust corpus are functions to be exercised only by the New York courts. But this is not to say that in an accounting proceeding in a New York court, full faith and credit is under no circumstances to be accorded those portions of an order or decree which validly are adjudicated elsewhere than in New York. This court's decision here is rested entirely on the unique (and unlikely to be duplicated) factual situation present in the proceeding pending before this court.

Accordingly the application of the trustee is granted as here indicated. The trustee's account is judicially settled and allowed. There was valid exercise, under the trust

indenture, of the power of appointment by Edward Goodrich Acheson, III in his last will and testament. The trustee is directed to distribute the trust corpus to the California executor of the will of Edward Goodrich Acheson, III, and the executor is directed to treat with the trust corpus to the exclusion of the separate assets of its testator, as follows:

(a) to pay federal and state estate, inheritance and income taxes to the extent of the total amount by which such taxes payable by the executor exceeds the amount of such taxes that would have been payable had the testator possessed no power of appointment over assets remaining in such trust at his death;

(b) to pay administrative expenses, including counsel fees, to the extent that such expenses exceeded the amount of such expenses that would have been incurred had the testator possessed no power of appointment over assets remaining in such trust at his death;

(c) to fund residuary Trust A described in paragraph Sixth of the will; and then to fund residuary Trust B described in such paragraph Sixth with the balance of such assets and to administer the same separate and apart from the testamentary assets of the Edward G. Acheson III estate; and

(d) as Helen F. Acheson was in being and Linda Belle Acheson was not in being at the time of the creation of the Margaret Maher Acheson Trust, any trust still subsisting under the will of Edward G. Acheson III twenty-one years after the death of Helen F. Acheson shall terminate as to all assets therein derived from the Margaret Maher Acheson Trust

In this court's view, the testimony which might be adduced if a Commission issued, as requested by the Group 1 respondents, would be immaterial and, because of the decision herein, academic. Nevertheless, if these respondents still desire the issuance of a Commission, it will be granted on condition that all expenses (including reasonable counsel fees for California attorneys) are paid by these respondents initially, reimbursement for which shall be made out of the trust corpus only if it is ultimately determined that such testimony was necessary in the proceeding before this court, and that the trust corpus should be distributed other than as provided for in the order to be entered in the proceeding herein, provided these respondents, within 10 days from service of a copy of such order, file their subscribed consents to such condition for grant of their application. Otherwise the application for issuance of a Commission is denied. The Commission, if issued, is to be promptly executed, and when returned is to be made part of the judgment roll herein. The court wants to make it clear that the Commission, or the results of the Commission, will not alter this decision; and that leave to proceed with the Commission, on the terms above stated, is granted only to afford the Group 1 respondents an opportunity to make a full record. Settle order on notice.

Dated: May 28, 1969

A. J. G.
J. S. C.

Decision and Order of California Superior Court, dated October 4, 1968

SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Dept. South A

Date. Oct. 4th, 1968.
Hon. Max Z. Wisot
M. Vande Weert
Judge C. H. Colby
Deputy Sheriff Robert A. Wakefield

SOP 9309

In the Matter of the Estate of EDWARD GOODRICH ACHESON, III, Deceased.

Counsel for Executor: Ralph N. Highsmith.

Counsel for Gdn. of Linda Acheson: Bell, Hunt, Hart and Brown.

Pray, Price, Williams & Death-erage.

Adams, Duque & Hazeltine.

Statistical Code
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NATURE OF PROCEEDINGS:

Motion for Relief from Order of Instructions to Executor on First Amended Petition and Determination of Heirship, having been heretofore submitted, the court now renders the following decision and order:

It appears from the record herein that the moving parties herein were fully advised of the pendency of the Bank of America's petition for instruction as early as June 20, 1967 (Quigley affidavit, ¶ 3) and in August 1967, a member of their firm's counsel indicated his firm took no steps to be represented in that California proceeding because "any order in that proceeding would have no effect on the outcome of the New York proceeding" (Quigley, ¶ 5). Neither of these crucial facts is denied by the Cohen affidavit. It is apparent also that at the last mentioned date, said counsel also contended that decedent's Will disclosed a mistaken understanding of decedent, repeated by letter September 7, 1967 (Quigley, ¶ 6). These matters, uncontradicted and otherwise not satisfactorily explained, bar the moving parties from any pretence to relief since it manifests quite the opposite to any statutory or equitable grounds for relief, *i.e., excusable* neglect, suprise, mistake, etc., or extrinsic fraud. A calculated strategic omission to act, however reasonable and well-advised it may be, is not the basis for relief when an unexpected result occurs.

The failure to receive inventory, despite requests and assurances, only indicates further permissiveness of moving parties' counsel or, at best, noncooperation of estate counsel but cannot be accepted as alternate grounds for relief since the code and case law establish no such ground, nor is it even asserted as grounds for relief that the noncooperation of counsel prevented or misled the moving

parties from duly asserting their rights and contentions in the California proceeding. The lack of receipt by various of the moving parties of the petition is contradicted by the declaration of service of counsel and is ultimately resolved, for practical purposes, by the knowledge of their counsel hereinbefore adverted to, of the pendency of the proceedings long in advance of the hearing date. While such counsel were not of record in the California proceeding, they may well be construed as the counsel for the intended recipients of the mailed notices of hearing for the purposes of this motion, since it is their representative's conduct and opinions that are also urged upon the court as grounds for relief by the moving parties. Any claimed misstatement of Attorney Highsmith to such heirs is not satisfactorily shown to have prevented or even induced non-action when considered in the light of their New York counsel's knowledge and approach to the problem, as herein referred to.

By reason of the foregoing views, it is not necessary to rule (nor do we) on the question as to whether there appears to be any merit under California Law to the substantive position taken by the moving parties, *i.e.*, that by reason of the decedent's alleged mistaken impression a different construction would have resulted had there not been a failure to contest.

Motion for relief is denied accordingly.

Dept. South A

Final Order of New York Supreme Court
Entered September 17, 1969

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City and State of New York, on the 17 day of Sept., 1969.

PRESENT: HONORABLE ABRAHAM J. GELLINOFF, JUSTICE.

In the Matter
of
The Settlement of the Final Account of Proceedings of MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee under an Indenture of Trust dated December 19, 1935 made by MARGARET MAHER ACHESON for the Benefit of EDWARD GOODRICH ACHESON, III.

Index No. 13186-1966.

The petitioner, Morgan Guaranty Trust Company of New York as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson, for the benefit of Edward Goodrich Acheson III, having presented to this Court its petition verified August 9, 1966, praying for an order of this Court judicially settling its final account of proceedings and for other relief as more fully hereinafter appears; and it appearing from said peti-

tion that the property which is the subject of said trust is specific personal property in the hands of the Trustee and is held and has been at all times held by the Trustee within the City, County and State of New York; and an order dated August 16, 1966, having been issued out of this Court to Bank of America National Trust & Savings Association as Executor of and Trustee under the Last Will and Testament of Edward Goodrich Acheson III, deceased, Helen F. Acheson, Linda Belle Acheson, Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson, being the only persons required to be made parties hereto under the provisions of the Civil Practice Law and Rules, or their attorney or attorneys, to show cause before this Court at a Special Term, Part I thereof, to be held at the County Court House, No. 60 Centre Street, Borough of Manhattan, City and State of New York, on the 23rd day of September, 1966, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a final order should not be made herein (a) judicially settling the final account of proceedings filed herein by Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, (b) construing said Indenture and the Will of Edward Goodrich Acheson III and instructing and directing Morgan Guaranty Trust Company of New York as Trustee as to the persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable, and (c) granting such other and further relief as to the Court may seem just and proper, together with such allowances, costs and disbursements as may be properly awarded in this proceeding; and said order to show cause having been returned with proof of due service thereof made in the manner and form prescribed by law and filed herein; and notice of this proceeding having been served upon the State Tax Com-

mission pursuant to Rule XIX of the New York County Special Term Rules; and the matter having come on to be heard at Special Term, Part I of this Court, on the 23rd day of September, 1966; and the petitioner, Morgan Guaranty Trust Company of New York, having appeared herein by Messrs. Davis Polk & Wardwell, its attorneys, Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson having appeared herein by Messrs. Cohen Swados Wright Hanifin & Bradford, their attorneys, Bank of America National Trust and Savings Association as Executor of the estate of Edward Goodrich Acheson III having appeared herein by Messrs. Meyer, Kissel, Matz & Seward (now known as Messrs. Seward & Kissel), its attorneys, and Helen F. Acheson having appeared herein by Messrs. Miller & Carlson, her attorneys; and this Court by its order dated September 29, 1966, having appointed Stephen A. Helman, Esq. the Guardian *ad litem* of Linda Belle Acheson an infant respondent; and said Stephen A. Helman, Esq. having filed his consent to act as such Guardian *ad litem* and an affidavit as to his responsibility; and Stephen A. Helman, Esq. as Guardian *ad litem,* as aforesaid, having filed his report and supplemental report herein; and the various parties having filed memoranda and reply memoranda in support of the position and contention of their respective clients; and the Court having been supplied with copies of the proceedings had in the Superior Court of the State of California, County of Los Angeles; and Messrs. Cohen Swados Wright Hanifin & Bradford, attorneys for respondents, Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson, having moved for a commission to take the depositions of Helen F. Acheson, Peter K. Sternad a Vice-President and Kyran M. Schmidt

an Assistant Trust Officer of Bank of America National Trust and Savings Association and Ralph N. Highsmith, Esq., attorney for Helen F. Acheson and Bank of America National Trust and Savings Association and submitted an affidavit of Paul P. Cohen, Esq., sworn to July 11, 1968, a letter dated August 20, 1968 and an affidavit of Gerald E. Porter, Esq., sworn to November 27, 1968, in support thereof; and an affidavit of W. Bernard Carlson, Jr., Esq., sworn to August 8, 1968, having been filed herein in opposition to said motion by Messrs. Miller & Carlson, attorneys for Helen F. Acheson, an affidavit of James C. Quigley, Esq., sworn to August 9, 1968, an affidavit of Marco F. Weiss, Esq., sworn to January 8, 1969, and a memorandum having been filed herein in opposition to said motion by Messrs. Seward & Kissel, attorneys for Bank of America National Trust and Savings Association as Executor of the estate of Edward Goodrich Acheson III; and Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, having rendered an account under oath to this Court of its acts and transactions in respect of said trust covering the period from February 6, 1962 through June 30, 1966; and this Court having examined the said account; and this Court after due deliberation having rendered and filed its decision in writing with respect to said Indenture and the Will of Edward Goodrich Acheson III as more fully hereinafter set forth; and upon reading and filing the affidavits of Andrew Y. Rogers, sworn to July 15, 1969, Stephen A. Helman, sworn to ~~July~~ August 5, 1969, James C. Quigley, sworn to ~~July~~ August 1, 1969, W. Bernard Carlson, Jr., sworn to July 23, 1969 and Paul P. Cohen, sworn to July 21, 1969; and the matter having been adjourned to this date;

Now on motion of Davis Polk & Wardwell, attorneys for the petitioner, it is

ORDERED, that the account of Morgan Guaranty Trust Company of New York as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson, for the benefit of Edward Goodrich Acheson III, covering the period from February 6, 1962 through June 30, 1966, be and the same hereby is judicially settled and allowed and that the following is a summary statement of said account as judicially settled and allowed:

SUMMARY STATEMENT OF THE FINAL ACCOUNT OF PROCEEDINGS OF MORGAN GUARANTY TRUST COMPANY OF NEW YORK AS TRUSTEE UNDER AN INDENTURE OF TRUST DATED DECEMBER 19, 1935, MADE BY MARGARET MAHER ACHESON, FOR THE BENEFIT OF EDWARD GOODRICH ACHESON III, COVERING THE PERIOD FROM FEBRUARY 6, 1962 THROUGH JUNE 30, 1966.

As to Principal:

The Trustee is charged as follows:

With amount of assets received, as shown by Schedule "A"	$30,068.04	
With amount of increase over inventory value on assets sold or collected, as shown by Schedule "B-2"	-0-	
Total Principal Charges		$30,068.04

The Trustee is credited as follows:		
With decreases under inventory value on assets sold or collected, as shown by Schedule "B-2"	$ –0–	
With amount of principal disbursed, as shown by Schedule "C"	$ –0–	
Total Principal Credits		$ –0–
Leaving a balance on hand, as shown by Schedule "D" at inventory value, consisting of:		
Securities	$29,575.56	
Cash	492.48	$30,068.04
As to Income:		
The Trustee is charged as follows:		
With amount of income collected, as shown by Schedule "E"	$20,316.79	
Total Income Charges		$20,316.79
The Trustee is credited as follows:		
With amount of income disbursed, as shown by Schedule "F"	$ 631.39	
With amount of income distributed, as shown by Schedule "F-1"	16,295.53	
Total Income Credits		16,926.92
Leaving a cash balance on hand, as shown by Schedule "G"		$ 3,389.87

AJG J.S.C. And it appearing that there is on hand $143,852.28, the market value balance of principal as of the last date embraced by this accounting;

And it appearing that the petitioner has requested this Court to construe the Indenture of Trust dated December 19, 1935 and the Will of Edward Goodrich Acheson III and instruct and direct it as to the persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable;

And it further appearing that Margaret Maher Acheson, a resident of the City of St. Petersburg, County of Pinellas, State of Florida, by an Indenture of Trust dated December 19, 1935, with Guaranty Trust Company of New York (now known as Morgan Guaranty Trust Company of New York) as Trustee, created a trust and provided that the income therefrom be paid to her son, Edward Goodrich Acheson, Jr., during his life and upon his death to divide the corpus into six separate equal parts and to continue to hold one of such parts in trust for the Settlor's grandson, Edward Goodrich Acheson III, during the term of his life, and upon the death of said Edward Goodrich Acheson III the trust was to be distributed in such manner as Edward Goodrich Acheson III should direct by his Last Will and Testament and in default of a valid appointment to the persons to whom and in the same manner and proportions as his personal estate would be distributed in case of his intestacy;

And it further appearing that Edward Goodrich Acheson III died on November 13, 1965, a resident of the City of Long Beach, County of Los Angeles, State of California, leaving a Last Will and Testament dated May 18, 1965, which was admitted to probate by the Superior Court of the State of California, held in and for the County of Los

Angeles, and that said Court appointed Bank of America National Trust and Savings Association of Long Beach, California, the Executor of and Trustee under said Will, which duly qualified and which is still acting as such Executor and Trustee;

And it further appearing that Edward Goodrich Acheson III by his Will exercised the power of appointment granted to him by said Indenture and gave, devised and bequeathed the rest, residue and remainder of his estate, including the remainder of the aforesaid trust, to his Trustee, Bank of America National Trust and Savings Association, to be held in trust for the benefit of his wife, Helen F. Acheson, and his daughter, Linda Belle Acheson, with other and further provisions as to the distribution of the principal upon the termination of said trusts;

And it further appearing that Helen F. Acheson, the widow of said Edward Goodrich Acheson III, was a person in being on December 19, 1935, the date of the creation of the trust herein accounted for and the said Linda Belle Acheson was born subsequent to said date; it is

ORDERED, that the true and proper construction of said Indenture of Trust dated December 19, 1935 and the Last Will and Testament of Edward Goodrich Acheson III is as follows:

(1) Margaret Maher Acheson by the Indenture of December 19, 1935, created a valid trust to continue during the life of her so , Edward Goodrich Acheson, Jr., and the life of her grandson, Edward Goodrich Acheson III, with the power in the said Edward Goodrich Acheson III to appoint said fund by his Last Will and Testament;

(2) Edward Goodrich Acheson III by his Last Will and Testament, (as construed by the Superior Court of

the State of California in proceedings which are binding upon all respondents), validly and effectively exercised the power of appointment granted to him by said Indenture of December 19, 1935;

(3) That the balance of principal of said trust under the Indenture of December 19, 1935, hereinafter found to be remaining under the payment of commissions and counsel fees and allowances, shall be transferred, paid over and delivered to Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Edward Goodrich Acheson III, which is hereby directed to treat with such corpus to the exclusion of the separate assets of its testator, as follows:

(a) To pay Federal and State estate, inheritance and income taxes to the extent of the total amount by which such taxes payable by the Executor exceeds the amount of such taxes that would have been payable had the testator possessed no power of appointment over assets remaining in such trust at his death;

(b) To pay administrative expenses, including counsel fees, to the extent that such expenses exceeded the amount of such expenses that would have been incurred had the testator possessed no power of appointment over the assets remaining in such trust at his death;

(c) To fund residuary Trust A described in paragraph "Sixth" of the Will for the benefit of his widow, Helen F. Acheson, and then to fund residuary Trust B described in such paragraph "Sixth" of the Will for the benefit of his daughter, Linda Belle Acheson, with the balance of such as-

sets and to administer the same separate and apart from the testamentary assets of the Edward Goodrich Acheson III estate;

(d) As Helen F. Acheson was in being and Linda Belle Acheson was not in being at the time of the creation of the Margaret Maher Acheson Trust, any trust still subsisting under the Will of Edward Goodrich Acheson III twenty-one years after the death of Helen F. Acheson shall terminate as to all assets therein derived from the Margaret Maher Acheson Trust.

And it appearing that this Court in its decision above referred to determined the motion made by Messrs. Cohen Swados Wright Hanifin & Bradford for the issuance of a commission and after reading and filing the affidavits of James C. Quigley, sworn to June 19, 1969 and Paul P. Cohen, sworn to June 24, 1969, has signed an intermediate order dated June 27, 1969, which provides as follows:

"ORDERED that the said motion is hereby denied unless, within ten days after service of a copy of this order with notice of entry, the respondents Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson serve upon all parties who have appeared herein, and file with the Court, a statement signed by the said respondents Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson agreeing that they shall pay all expenses incurred in connection with said depositions, including reasonable counsel fees for the attendance at the depositions by California counsel to Helen F. Acheson and Linda Belle Acheson and

reasonable counsel fees for California counsel to the Bank of America National Trust & Savings Association; and it is further

ORDERED that upon the service and filing of said written statement as aforesaid, a commission issue to Rodney A. McKeever of the office of Noon and Pratt, Suite 1120, 707 Broadway, Los Angeles, California, a Notary Public of the State of California, or some other Notary Public of that office, to take the depositions upon oral examination of Helen F. Acheson, Kyran M. Schmidt, Peter K. Sternad and Ralph N. Highsmith as witnesses on behalf of the respondents Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson, and it is further

ORDERED that the commission, if issued, shall be executed and returned with all due diligence and shall be made part of the judgment roll herein, and it is further

ORDERED that if the commission shall be issued this Court shall retain jurisdiction in this proceeding for the purpose of enforcing the obligation of the respondents Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson to pay the aforesaid expenses incurred by Bank of America, National Trust & Savings Association, Helen F. Acheson and Linda Belle Acheson in connection with the depositions, and it is further

ORDERED that reimbursement for the aforesaid expenses incurred by the respondents Laura Acheson Dowell, Edward Goodrich Acheson IV, Mar-

garet Acheson Kennedy, Thomas R. Acheson and John W. Acheson in connection with the depositions shall be made out of the corpus of the trust under indenture dated December 19, 1935 made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson III only if it is ultimately determined that the testimony of Helen F. Acheson, Kyran M. Schmidt, Peter K. Sternad and Ralph N. Highsmith was necessary in the proceeding before this Court, and that the trust corpus should be distributed other than as provided for in the final order to be entered herein, and it is further

ORDERED that this order is deemed part of the final order and decree to be entered herein";

It is further

ORDERED, that Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, is hereby authorized and directed to pay out the balance of principal in its hands as follows:

(a) To Morgan Guaranty Trust Company of New York the sum of $1140.29 as and for the principal commissions to which it is entitled upon this accounting, as appears from the computation of commissions;

(b) To Messrs. Davis Polk & Wardwell the sum of $3,000 $\frac{00}{xx}$ as and for an allowance and in payment of their services rendered to the Trustee in the administration of said trust, including all services in this proceeding, together with the sum of $349.56 their disbursements herein;

A.J.G.
J.S.C.

(c) To Stephen A. Helman, Esq. the sum of $3,000 $\frac{00}{xx}$ as and for an allowance for his services as Guardian *ad litem* of the infant respondent herein;

(d) To Messrs. Seward & Kissel the sum of $5,000 $\frac{00}{xx}$ as and for an allowance and in payment of their services in representing Bank of America National Trust and Savings Association as Executor of the estate of Edward Goodrich Acheson III throughout this proceeding and on the question of construction of the Indenture of December 19, 1935 and the Last Will and Testament of Edward Goodrich Acheson III, ~~together with the sum of~~ $ said sum to include their disbnrsements herein;

A.J.G.
J.S.C.

(e) To Messrs. Miller & Carlson the sum of $3,000 $\frac{00}{xx}$ as and for an allowance and in payment of their services in representing Helen F. Acheson throughout this proceeding and on the question of construction of the Indenture of December 19, 1935 and the Last Will and Testament of Edward Goodrich Acheson III, ~~together with the sum of~~ $ said sum to include their disbursements herein;

A.J.G.
J.S.C.

(f) To Messrs. Sohen Swados Wright Hanifin & Bradford the sum of $5,000 $\frac{00}{xx}$ as and for an allowance and in payment of their services in representing Laura Acheson Dowell, Edward Goodrich Acheson IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson throughout this proceeding and on the question of construction of the Indenture of December 19, 1935 and the Last

Will and Testament of Edward Goodrich Acheson
A.J.G. III, ~~together with the sum of~~ $ said sum to include
J.S.C. their disbursements herein;

(g) To transfer, pay out and deliver to Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Edward Goodrich Acheson III, deceased, the balance remaining in its hands, after making the payments and deductions hereinbefore directed to be made, to be administered by it as Executor of and Trustee under the Will of Edward Goodrich Acheson III in accordance with the aforesaid provisions of this order, in full payment and satisfaction of all balances of principal due to it from said trust by reason of the exercise of the power of appointment by the Will of Edward Goodrich Acheson III.

And it is further

ORDERED, that Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, is hereby authorized and directed to pay out the balance of income in its hands as follows:

~~(a) To Morgan Guaranty Trust Company of New York the sum of $ as and for the~~
A.J.G. ~~income commissions to which it is entitled upon~~
J.S.C. ~~this accounting, as appears from the computation of commissions;~~

(b) To Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Edward Goodrich Acheson III, deceased, the sum of $1,096.29 in full payment and satisfaction of all balances of income collected or accrued and unpaid to Edward Goodrich Acheson III through the date of his death;

(c) To Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Edward Goodrich Acheson III, deceased, the ~~sum of~~ $ balance remaining together with all net income collected since the date of the account after deducting therefrom all proper charges and the income commissions of Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, in full payment and satisfaction of all balances of income due to it upon this accounting.

A.J.G.
J.S.C.

And it is further

ORDERED, that upon compliance with the provisions of this final order Morgan Guaranty Trust Company of New York individually and as Trustee, as aforesaid, be and it hereby is relieved and discharged of and from any and all liability, responsibility and accountability as to all matters embraced in said account and in this final order.

Enter

A. J. G.
J. S. C.

FILED
SEP 17 1969
Co Clerk's Office
New York